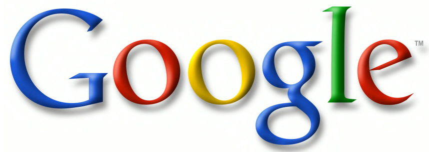

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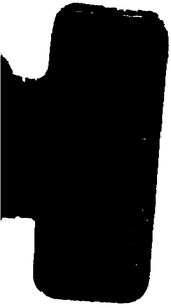

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT

BY

WENDELL P. STAFFORD

VOLUME 69

NEW SERIES--VOLUME 1

ST. JOHNSBURY, VT.
CALEDONIAN PRESS—C. M. STONE & Co.
1897

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OF THE

SUPREME COURT OF VERMONT

DURING THE TIME OF THESE REPORTS.

HON. JONATHAN ROSS, CHIEF JUDGE.

HON. RUSSELL S. TAFT.
HON. JOHN W. ROWELL.
HON. JAMES M. TYLER.
HON. LOVELAND MUNSON.
HON. HENRY R. START.
HON. LAFORREST H. THOMPSON.

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Wood v. Gill, 1 N. J. L. 449 - 379
Wood v. Ins. Co., 31 Vt. 552 - 496
Wright v Watts, 3 Q. B. 89 - 492
Young v. Judd, Brayt. 151 - 547

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ERRATA.

Page 22, *Gregg & Co.* v. *Beane*. *Taft*, J., did not sit.
Page 88, eighth line. for "was tied," read "was not tied."
Page 94, *Terryberry* v. *Woods*. Insert, "Present: Ross, C. J., Taft, Rowell, Tyler, Munson and Thompson, JJ."
Page 154, *Cutler & Martin* v. *Skeels*. *Start*, J., did not sit.
Page 235, fifth line. For "plaintiff," read, "defendant."
Page 243, last line of head-note. For "donor," read, "donee."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT.

WILLIAM B. HAYES by next friend *vs.* THE COLCHESTER MILLS.

January Term, 1894.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Risks Assumed by Employee—Fellow-Servant—Master's Duty to Caution and Instruct—Liability to Child—Evidence for Jury.

A servant assumes the risks incident to his employment including those which arise from the negligence of a fellow-servant, even though such fellow-servant has authority to direct his labors; and this rule applies to a minor, though of tender years. But in such case the rule is modified by the duty resting upon the master to warn and instruct; and even warning and instruction will not relieve him from liability if the service required of the child was beyond his capacity and outside the scope of of his employment.

In the case at bar, the plaintiff having been engaged to do such general work as might be suited to his capacity, it was for the jury to say whether the service required of him was beyond his capacity and therefore outside the scope of his employment.

The master is not relieved from liability by the fact that the improper task was imposed by a fellow-servant if such fellow-servant was acting within the scope of his own employment in imposing it.

If a servant, acting within the scope of his employment, sets his fellow-

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servant a task which requires warning and instruction, such duty devolves upon the servant giving the order, and his negligence in that respect is the negligence of the master.

If the mere description of a service shows that it is hazardous, there is no need that witnesses should characterize it as such.

The burden was upon the plaintiff to prove that the defendant failed in its duty to give him instructions. But although the court seems to have submitted the case upon the opposite theory, the defendant cannot avail itself of the objection here, having neglected to raise the question in the court below.

Upon the facts of this case the court could not say as a matter of law that the danger was so obvious as to make warning and instruction needless.

ACTION ON THE CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the April Term, 1893, Chittenden County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

W. L. Burnap, *Henry Ballard* and *H. F. Wolcott* for the defendant.

The plaintiff is seeking to recover for negligence of a co-employee on the ground that the latter sustained to the defendant the relation of vice-principal.

The plaintiff was fourteen and one-half years old and had been employed in the room where he was injured for two years around and near the shafts.

He was conceded to be a boy of ordinary education and intelligence. If warning and instruction were necessary, there was no evidence that they had not been given; there was no evidence upon the subject. The risk, whatever it was, was perfectly apparent. It was not claimed that the accident occurred by reason of any defect in the machinery or its operation, nor that Sturgis, whom the plaintiff was assisting at the time of the accident, was incompetent.

Sturgis in requiring and the plaintiff in giving the assistance were acting within the scope of their employment.

If there was any negligence it was the negligence of Sturgis. The defendant was entitled to a verdict upon the plaintiff's evidence because it did not disclose the breach of any duty imposed upon the defendant in the relation of master.

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Sturgis and the plaintiff were strictly fellow-servants. The rule which forbids recovery of the master for the negligence of a fellow-servant is not changed by the fact that the plaintiff is a minor. *Pittsburgh, etc., R. Co.* v. *Adams*, 105 Ind. 151: 5 N. E. 187; *Gartland* v. *Toledo, etc., R. Co.*, 67 Ill. 498.

The plaintiff was employed to do such work as might be suited to his capacity and the master never authorized Sturgis to set him a task beyond that. Consequently, as Sturgis was only a fellow-servant and not vice-principal, his act in setting the task was not the act of the master, if the task was beyond the plaintiff's capacity. *Felch* v. *Allen*, 98 Mass. 572; *Pittsburgh, etc., R. Co.* v. *Adams, supra.*

The plaintiff was bound to show that he needed instruction and that the master knew it. His minority alone did not make this out. *Ciriack* v. *Merchants' Woolen Co.*, 146 Mass. 182: 15 N. E. 579, *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261: 15 N.E. 576; *Downey* v. *Sawyer*, 157 Mass. 418: 32 N. E. 654. In this case not only was there no evidence that instruction was needed but the contrary appeared.

The charge was fatally defective in omitting the statement of the rule requested by the defendant, that "if the plaintiff was acting within the scope of his employment he assumed any peril incident thereto which was apparent, obvious and comprehensible to him." That this is the true rule cannot be questioned. That the court did not adequately state it is plain.

C. M. Wilds, *Seneca Hazelton* and *E. R. Hard* for the plaintiff.

Whether the task was so dangerous and the plaintiff's judgment so immature that instructions were required was a question for the jury and the court properly refused to treat it as a matter of law. *Reynolds* v. *B. & M. R. Co.*, 64 Vt. 66; *Dumas* v. *Stone* 65 Vt. 442; *Worthington* v. *Central Vt. R. Co.*, 64 Vt. 107; *Vinton* v. *Schwab*, 32 Vt.

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612; *Hinckley* v. *Horazdowsky* 133 Ill. 359: 8 L. R. A. 490, and note; Shear. & Red. Neg. (4 ed.) § 218; 2 Thomp. Neg. 978; Wharton Neg. (2 ed.) § 216; *Patnode* v. *Warren Cotton Mills*, 157 Mass. 283: 32 N. E. 161; *Glover* v. *Dwight Mfg. Co.*, 148 Mass. 22: 18 N. E. 597; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Kehler* v. *Schwenk*, 151 Pa. 505: 25 Atl. 130; *Fisher* v. *D. & H. Canal Co.*, 153 Pa. 379: 26 Atl. 18.

The defendant cannot escape liability under the fellow-servant doctrine. The duty being cast upon the defendant to warn and instruct, he was not relieved therefrom by the fact that he had delegated to another, whether co-servant with the plaintiff or not, the authority to direct the plaintiff in his work. Harris Dam. by Corp. 616; *Hinckley* v. *Horazdowsky and note, supra*; *Yeaman* v. *Noblesville Foundry & Machine Co.*, 3 Ind. App. 521: 30 N. E. 10; *Union Pac. R. Co.* v. *Fort*, 17 Wall. 553.

The charge correctly stated the duty of the defendant to the plaintiff.

The defendant's request to charge that "any peril that was apparent, obvious and comprehensible to him was assumed," was complied with in substance and in clearer form. So also was the request upon the subject of the defendant's duty to instruct.

MUNSON, J. The plaintiff, a boy of fourteen, was one of several helpers employed in the defendant's spinning-room. He lost an arm while at work under the immediate direction of one Sturgis, who was mending a belt which hung from a revolving shaft. The plaintiff was standing near the top of a step-ladder, holding the belt from the shaft to prevent it from crawling, when he was caught by the belt in some manner and drawn over the shaft. He had been employed in this room about two years. His evidence tended to show that his ordinary duties were to sweep the floor, pick up waste, change bobbins, mend broken threads and occasionally oil and clean some parts of the machinery when it was

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not running; that up to this time he had not been called upon to render such service as he was engaged in when injured, nor assisted in mending a belt, nor made use of a step-ladder; that Sturgis was the second hand in the spinning-room, and had the oversight of the machinery, and the immediate charge of the helpers, and entire charge of the room when the first hand was absent from it, as was the case at the time of the accident; that Sturgis generally hired the helpers, and set them at work, and discharged them if dissatisfied, but that the first hand could retain them notwithstanding Sturgis' action if he thought best.

The shaft from which this belt was hanging was the main shaft, elevated thirteen feet above the floor, and having three hundred revolutions a minute. Attached to this shaft was a drum four feet in diameter, which was connected by a twelve-inch belt with the gearing of the water power beneath. There was a space of five or six feet between the drum and the wall of the building. The step ladder was set up in this space, by the side of the drum and main belt, and about a foot from them. It was a step ladder of the ordinary construction, twelve feet high, somewhat worn, and not entirely firm. There was nothing by which the plaintiff could steady himself but the ladder. The rapid motion of the drum and connecting belt produced a considerable movement of the air where the ladder stood. It was not claimed that the plaintiff came in contact with either the drum or the main belt. The evidence of the plaintiff tended to show that on going up the ladder he became frightened, and returned to the foot of the ladder and told Sturgis he did not want to stay up there for fear he would be hurt, and that Sturgis thereupon clapped his hands together and told him with an oath to go up or take his hat and go home, and that upon this he went up the ladder again and received his injury.

The case was submitted to the jury on the theory that there was evidence tending to show that Sturgis was negligent in requiring of the plaintiff a dangerous service not

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suited to his capacity, and in failing to give him such advice and instructions as the case required; and that the negligence of Sturgis in these respects was the negligence of the defendant. The defendant insists that there was no evidence tending to show negligence in the respects claimed, and that if there was any negligence on the part of Sturgis it was the negligence of a fellow-servant.

It is well settled that one who engages in a dangerous employment as the servant of another takes upon himself all the risks which are ordinarily incident to that employment, and that among the risks thus assumed are those which arise from the negligence of a fellow-servant. It is also true that one who is engaged with another in the same employment is not divested of the character of a fellow-servant by the mere fact that he has authority to direct the other in his work. A minor, even if a child of tender years, is held to be within the application of these general rules. But in the case of young persons their effect is modified by other rules, which impose special duties upon the employer in view of the inexperience and want of judgment of servants of this class. It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils incident to his work, and instruct him how to avoid them. But the giving of proper instructions will not relieve an employer from liability to a child, if the work required of him was not within the scope of his employment and not such as ought to have been required of a person of his capacity.

The plaintiff was not engaged for the performance of any specific work. He was to do such general work in the spinning room as was suited to his capacity. His engagement contemplated the undertaking of more difficult work as he became fitted to do it. It is evident that this is not a case in which it can be said as matter of law that the service the plaintiff was called upon to render was or was not such as it was his contract duty to perform. This new service

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had come within the line of his employment if his advancing years and experience had prepared him to undertake it. It had not come within the line of his employment if it was still beyond his capacity. It was therefore proper for the court to treat the question of the defendant's negligence in requiring the service as depending simply upon the plaintiff's capacity.

If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been held to have assumed them by consenting to do the work; but the rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. This limitation of the plaintiff's risk renders the doctrine of fellow-servant inapplicable. In entering the defendant's service, the plaintiff assumed only such risks arising from the negligence of his co-employees as might be incurred within the scope of his employment. So it is not necessary to determine whether the nature and extent of Sturgis' authority over the plaintiff were such as to exclude him from the relation of fellow-servant. The effect of his authority over the plaintiff is to be considered without reference to that relation. The defendant assigned Sturgis to the care of the machinery and placed the plaintiff under his orders. If Sturgis, acting within the sphere of his own duty, required of the plaintiff a service which was outside his employment, and which a prudent master would not have imposed upon a person of his years, strength and judgment, the defendant is liable for the consequences of the improper order.

In *The Union Pacific Railroad Company* v. *Fort*, 17 Wall. 553, a boy of sixteen had been engaged as a helper in a machine shop. After he had been employed for a few months in receiving mouldings as they came from a machine, he was sent by the person under whose direction he was working

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into the midst of rapidly revolving machinery to adjust a belt, and in attempting to do this received an injury. It was found that this service was beyond the scope of the boy's employment, and was one which a prudent man would not have required him to undertake. It appeared also that the person giving the order had the care and management of the machinery. The plaintiff in error was held liable. The court considered that the rule exempting the master from liability for the negligent conduct of a co-employee in the same service, did not apply; that the rule stood upon the presumption that an employee, in entering the service of his principal, took upon himself the risks incident to the undertaking; and that this presumption could not arise where the risk was not within the contract of service and the servant had no reason to believe he would have to encounter it.

It is apparent that the plaintiff's evidence entitled him to go to the jury upon the question of negligence as depending upon his capacity for the service, irrespective of the giving of instructions, and that this alone would have prevented the direction of a verdict for the defendant.

But assuming that the service required of the plaintiff was such as he might properly have been called upon to undertake with suitable instructions, it remains to consider whether there was evidence tending to show that the defendant was negligent in failing to instruct him.

It is said there was no evidence that the service was hazardous. It was not necessary to have the service so characterized by witnesses. The mere description of the work was evidence tending to show that it was hazardous. It is said that the previous service of the plaintiff had been such that his employer was justified in assuming that he was fitted to undertake the work required of him. The length of time the plaintiff had been employed there, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, were important to be considered by the jury, but afforded no basis for a conclusion of law. In-

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asmuch as the evidence tended to show that this was a service essentially different from any before required of him, it could not be assumed that his experience was such that instructions were unnecessary. It is also said that it does not appear but that instructions were given. It is true that the burden is upon the plaintiff to show a failure in this respect, and that the statement of the case contains nothing as to any evidence on this point. But the defendant is not in a position to avail itself of this objection. The point was not brought to the attention of the court by the request which is treated as a motion to direct a verdict. It was in no way suggested by the request relating to the subject of instructions. The only reference made in the charge to the situation of the case in this respect was the statement that it did not appear that any instructions were given. The jury were thus told, in effect, that they were to start in their consideration of the subject of instructions with the fact that none were given, and no exception was taken to this method of submitting the case.

It is further insisted that however different this service may have been from the work plaintiff had previously done, it must be supposed from his long employment in the room that he knew the shaft was in motion and that contact of the belt with it would be dangerous, so that any instructions that could have been given would have simply covered what he already knew. In *Buckley* v. *Gutta Percha, etc., Mfg. Co.*, 113 N. Y. 540, a boy who was in the performance of his duty about a machine at which he had worked for several days, slipped on the floor, and involuntarily threw out his hand, in such a manner as to thrust it into a set of cog-wheels. Here it was said to be "impossible to perceive how the absence of instructions had anything to do with the injury." In *Ogley* v. *Miles*, 139 N. Y. 458, the plaintiff lost his fingers by a buzz-saw soon after he was set to work at one by the defendants without instructions. It appeared, however, that he had operated such a saw before, long enough

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to learn the nature of it, and the danger attending its use; and the court considered that this placed him "in the same position as to knowledge that he would have been in had the defendants imparted to him oral information of the dangerous character of a buzz-saw."

But we think the case under consideration is not fairly within this line of decisions. The plaintiff was suddenly called upon to perform a service which was essentially different from any he had before undertaken. The danger of the service lay somewhat in the place where it was to be done, and the position it was necessary to take in doing it. It cannot be assumed from the fact that the plaintiff knew in a general way of the movement of the shaft and its effect upon a belt, that he so understood the dangers connected with the performance of this particular service that the caution and instruction of an experienced workman would have been of no benefit to him. We think the plaintiff's knowledge in the respects stated will not justify us in holding as matter of law that he was not entitled to caution or instruction under the circumstances disclosed by his evidence.

It being for the jury to determine whether instructions should have been given the plaintiff, it is necessary to consider whether any omission of Sturgis in this matter was the negligence of the defendant. It is evident that the right of an employee to receive instructions cannot be made to depend upon the presence of the employer or his general representative. The duty must often rest upon the one whose order creates the necessity for the instruction. In such a case the employer cannot excuse himself for the employee's failure to receive instruction by saying it was the neglect of a fellow-servant. If it became the duty of the defendant to instruct the plaintiff, the performance of that duty devolved upon Sturgis, and any negligence of Sturgis therein would be chargeable to the defendant. This holding is not upon the ground that Sturgis was not a fellow-servant of the plaintiff in the general sense, but upon the ground that his connection

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with the plaintiff in this transaction was such that when occasion arose for instructing the plaintiff he was in that matter the representative of the defendant. When an employee, although a fellow-servant of the injured employee, is charged with the master's duty to such employee, his failure in that duty is the negligence of the master, and the doctrine of fellow-servant does not apply.

So there was evidence tending to show that the defendant was negligent in the matter of instructions.

The defendant's fourth request, to the effect that the duty of instruction would depend upon the plaintiff's need of it, and not upon the fact of his minority, was fully complied with.

The defendant requested the court to charge that if this service was within the scope of the plaintiff's employment, he took the risk of any peril attending it "that was apparent and obvious and comprehensible to him." We think this request was substantially complied with. The jury received the following instruction: "It is true, as a general rule of law, that employees take the ordinary risks incident to their employment. And this applies to children, if they are able to understand clearly the risks and dangers. If they are not able to understand the risks and dangers, then they should be informed and appraised of them." The jury had before this been told that "if a child has mind enough, discretion enough, to fully appreciate the danger, then the caution would not be required." And again: "If a child has mind and discretion sufficient to see and fully appreciate the danger to which he is exposed, then the law requires that he shall use that capacity in order that he may recover." We are satisfied from a careful examination of the whole charge that the jury must have understood that if this service was within the scope of the plaintiff's employment, and the danger attending it was obvious and comprehensible to him, he took the risk of it, and was not entitled to recover.

No exception was taken to the charge as given.

Judgment affirmed.

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FIRST NATIONAL BANK of Brandon *vs.* GEORGE BRIGGS' ASSIGNEES.

May Term, 1894.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Official bond—Scope—Absence of Seal.

A bond was given by one Briggs for the faithful performance of his duties as cashier of a national bank "forever, so long as he should occupy the position." The United States statute provided that the cashier should be appointed and removed by the directors at their pleasure; and the directors of this bank had passed a by-law declaring that the cashier should be elected to hold office during the pleasure of the board. The bond was executed March 5, 1883. On February 3, 1883, Briggs had been elected "for the year ensuing." On January 8, 1884, and annually thereafter, for nine years, he was re-elected. All his defaults occurred after the expiration of the first year. In an action upon the bond, *held* that the surety was not liable.

An instrument, in form a bond, though without seals, if executed upon sufficient consideration and delivered to take effect as security, is a valid obligation.

APPEAL from the allowance by the Court of Insolvency for the District of Rutland of a claim against the estate of George Briggs, insolvent debtor, as surety upon the official bond of F. E. Briggs as cashier of the plaintiff. Adjudged, *pro forma*, upon an agreed statement of facts, at the March Term, 1894, Rutland County, *Munson*, J., presiding, that the action might be maintained. The defendant excepted.

February 3, 1883, F. E. Briggs was elected by the directors cashier of said bank for the year ensuing. March 5, 1883, the bond in question was executed. January 8, 1884, and annually thereafter for nine years, said F. E. Briggs was elected by the directors, and during all that time served as cashier of the plaintiff. None of the defaults occurred during the years 1883 and 1884.

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J. C. Baker for the plaintiff.

U. S. Rev. St. 5136, Sub. 6 and 7, empowers directors of national banks to appoint and dismiss cashiers and to prescribe by by-laws the manner of their election.

The plaintiff by its by-laws prescribed that the cashier should be appointed to hold his office "during the pleasure of the board."

There is no requirement of law that the cashier shall be appointed for any definite time. The usage of the directors to re-elect each year, does not make the office an annual one. *Amherst Bank* v. *Root*, 2 Met. 522. The re-election of Briggs did not create a new term, but was simply an expression of the will of the directors that he should remain in office. He would have continued to hold the office without a re-election. Morse on Banks (2 ed.) 227.

The bond is not invalid for want of seals. *United States* v. *Linn*, 15 Pet. 290.

Stewart & Wilds for the defendant.

No question can be made as to the power of the directors to employ and appoint a cashier for a definite term subject to their right to dismiss him at their pleasure. Neither the statute nor the by-law provides otherwise. In the exercise of their duty the directors elected F. E. Briggs "for the year ensuing."

His term was limited to one year and he was bound for one year, though he might be dismissed before the end of it. It was for his fidelity in this contract that George Briggs became his surety. The surety's liability cannot be more extensive than this contract unless there are unequivocal words importing it. They must expressly point to subsequent elections. The "forever" of the bond is the "forever" of the contract of employment. *Lord Arlington* v. *Merricke*, 3 Saund. 411a; *State Treasurer* v. *Mann* 34 Vt. 371; *Hassell* v. *Long*, 2 M. & S. 363; *Wardens of St. Saviour's, etc.* v. *Bastock* 5 B. & P. (2 N. R.) 175; *Kitson* v. *Julian et al*, 4 El. & Bl. 854; *Dover* v. *Twombly*, 42 N. H 59; *Norridgewock*

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v. *Hale*, 80 Me. 362; Mechem, Pub. Off. § 286; Throop Pub. Off. §§ 205, 207; Thomp. Liab. of Off. p. 512, § 8; Murfree, Off. Bonds, § 420 *et seq.*

The plaintiff cannot recover, because the bond is unsealed. *Barnet* v. *Abbott*, 53 Vt. 120; *Rutland* v. *Paige*, 24 Vt. 181.

MUNSON J. The plaintiff is a corporation organized under the National Bank act. Its board of directors was empowered by that act to appoint a cashier and dismiss him at pleasure, and to prescribe by-laws, not inconsistent with law, regulating the manner in which the cashier should be appointed. A by-law was adopted which provided that the cashier should be appointed to hold his office during the pleasure of the board. The insolvent's first election as cashier was for the year ensuing, and he was thereafter for ten years annually re-elected. Soon after his first election, he gave the bond in controversy, which is conditioned for the faithful discharge of his duties as cashier forever, so long as he should occupy the position. The defaults complained of occurred after the expiration of his first official year.

We are not aware that the precise question raised by this statement has been passed upon; but a review of the course of decision by which courts have arrived at what must now be regarded the settled law upon the subject of official bonds, will aid us in the disposition of the case.

In *Lord Arlington* v. *Merricke*, 3 Saund. 411 a, the delinquent was a deputy-postmaster, who was originally appointed for six months, but whose bond was for and during all the time that he should continue in the office. The time for which he was appointed was recited in the condition, and it was considered that the terms of the obligation must be held to refer to the recital, and that the liability was thereby limited to six months. In *Liverpool Waterworks Co.* v. *Atkinson*, 6 East 507, there was a recital in the condition of the bond that the defendant had agreed with the plaintiff to collect its revenues for twelve months, and the

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condition was that the defendant should justly account during the continuance of such his employment, and for so long as he should continue to be employed; and it was held that the obligation was confined to the twelve months mentioned in the recital. These cases are authority for saying that when a definite period of appointment is recited in the condition, the obligation will not be extended beyond that period by any subsequent general words.

In *Wardens of St. Saviour's* v. *Bastock*, 5 B. & P. (2 N. R.) 175, it was shown by the recital in the condition that the principal was appointed collector of the church rate of the parish, but the period of appointment was not stated. It appeared from the replication that the first appointment was for one year, and that the incumbent was continued in office by annual re-appointments. The office was apparently an annual one by virtue of the local act under which the rates of the parish were managed. The bond was upon condition that the collector should from time to time account for all monies received by him on account of the rate assessed, or of any other rates which might thereafter be made and collected by him. The court considered that the case could not be distinguished from that of the *Liverpool Waterworks Co.* v. *Atkinson*. In *Peppin* v. *Cooper*, 2 B. & Ald. 431, the condition recited an appointment as collector of land taxes under an act of Parliament, but the term of appointment was not stated. The condition of the bond was to account for monies received at all times thereafter. The court held that these words must be construed with reference to the recital and the nature of the appointment therein mentioned; and that inasmuch as the fact that the appointment was an annual one could be learned from the act of Parliament under which it was made, it was unnecessary to state that fact, either in the bond or in pleading. These cases are authority for saying that when the appointment is for a definite period fixed by law, a recital of the term in the bond is not necessary to limit the effect of general words

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which in themselves would indicate a continuing liability.

The above cases, and others of the same holding, were reviewed by this court in *State Treasurer* v. *Mann*, 34 Vt. 371, and it was then considered upon their authority to be perfectly settled that when the appointment is for a limited period, which is recited in the condition of the bond, or, if not recited, is fixed by law, the liability will be confined to the period named in the condition or fixed by law, although the language of the condition is general and unlimited. In that case the delinquent was the director of a bank by whose charter the office was made annual. Acts 1842, p. 107. At his first election he gave a bond conditioned to secure the due performance of his duty as director while he should continue in the office, and gave no bonds when subsequently re-elected. The bond was held to cover the defaults of the first year only. It is sufficient to say that the authorities in this country are entirely in accord with this decision.

Kitson v. *Julian*, 4 El. & Bl. (82 E. C. L.) 854, covers ground in advance of these cases. In that case the delinquent was appointed an officer of a private corporation, and gave a bond conditioned to account for all monies collected by him "from time to time and at all times so long as he should continue to hold the said office or employment." The bond contained no recital of the period for which he was appointed. The plea averred that the appointment was for one year from a day named. The replication averred that the appointee continued in his employment, with the assent of the defendants and the company, after the expiration of the year. It was held that inasmuch as the condition of the bond recited the appointment, it was to be assumed that the extent of that appointment was known to the signers of the bond, and that they contracted with reference to it. This case is authority for saying that general words will not extend the liability beyond the term of the appointment named in the

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recital, although the extent of the appointment is neither given in the recital nor fixed by law.

It is not to be understood, however, that words may not be used in the condition sufficiently specific to extend the liability beyond the time of the original appointment. But to have this effect the words must be such as clearly to indicate that the parties contracted with reference to a further liability. In *Hassell* v. *Long*, 2 M. & S. 363, the officer was a collector of taxes imposed by act of Parliament, and the condition was to account for monies received on any tax then imposed or which might thereafter be imposed. The court held that inasmuch as the imposition of further taxes within the year, however improbable, was not impossible, the words employed were not sufficiently clear and certain to extend the liability beyond the current year. But whenever the words clearly indicate that it was the intention of the parties to furnish security for the time the appointee should continue in office without regard to the term of his appointment, they are to be given their full effect. In *Augero* v. *Keene*, 1 M. & W. 390, the condition, after reciting the appointment, held the appointee to an accounting for such monies as he should receive "from time to time at all times thereafter during such time as he should continue in his said office of collector, whether by virtue of his aforesaid appointment, or of any reappointment thereto." The court considered the liability of the obligors for the entire period to be beyond question. The same effect was given to words of like import in *Oswald* v. *Berwick-upon-Tweed*, 5 H. L. 856.

It is also held that when the office is by term annual a further provision that the incumbent shall remain in office until his successor is appointed does not take the case out of the rule above presented. In *State Treasurer* v. *Mann*, already cited, it was said that the office was to be regarded as annual notwithstanding such a provision. In *Welch* v. *Seymour*, 28 Conn. 387, the articles of association of a

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corporation provided that its treasurer should continue in office until the next annual meeting and until another should be elected in his stead. It was held that the office was an annual one, and that the obligation of the bond did not extend beyond the year. In *Dover* v. *Twombly*, 42 N. H. 59, the incumbent of an annual office held through another year by force of a statutory provision in default of the appointment of a successor. It was held that the bond, although general in terms, was good only for the time for which the principal was appointed. In *Chelmsford Company* v. *Demarest*, 7 Gray 1, it was provided that the treasurer of a corporation should be chosen annually and hold office until the election and qualification of his successor. Here it was said that the obligation of the bond extended to the next annual meeting or the meeting at which the next annual election should be made, and for such reasonable time after that as would enable the successor to complete his qualification, and no further.

The plaintiff does not question the doctrine of these decisions; but it contends that in view of the statutory provision regulating the tenure of these appointments it must be considered that the cashier, although appointed for a year and re-elected at the end of the year, was holding his office during the pleasure of the board; and that his various re-elections did not create new terms, but were simply expressions of the will of the directors that he should continue in office.

Much of the reasoning relied upon in support of this contention is derived from *Amherst Bank* v. *Root*, 2 Met. 522. In that case it appeared from the records of the corporation that the cashier's first appointment was for the year ensuing, and that at the expiration of the year he was again appointed for the year ensuing, after which he continued to serve for several years without re-appointment. There was, however, a statutory provision that a cashier should retain his place until removed or until another was

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appointed in his stead; and it was considered that although the election was for a year the law made it a continuing office. *Dewey*, J., dissented on the ground that the appointment having been in fact made for a year, the sureties could not be holden for defaults occurring after the year.

It is said in 1 Morse on Banks § 27, upon the authority of *Amherst Bank* v. *Root*, that a mere usage of the directors to re-elect every year does not impart to the office the legal character of annual duration, that sureties will not be presumed to have contracted with reference to such a usage, and that a re-election in pursuance of the usage will not limit the obligation of the bond. But this must be read with a remembrance that in the case under review the court considered that the office was a continuing one by force of the statute.

The controlling effect of the statute upon the disposition of *Amherst Bank* v. *Root* is emphasized by a later case. In *Richardson School Fund* v. *Dean*, 130 Mass. 242, where the statute left with the corporation the right to fix the term of office as it saw fit, it did not appear what the by-laws of the corporation were, but the corporation had for a long series of terms elected its treasurer triennially. It was held that as there was no statute which made the office a continuing one, the reasoning in *Amherst Bank* v. *Root* was not applicable; and that the corporation had by its long and uniform practice made the office a triennial one, so that when the defendants made their contract it was with reference to a fixed and limited term.

It is evident that the case of *Amherst Bank* v. *Root*, if followed, will not be decisive of the case at bar, unless the United States statute is held to have the same effect that was given to the Massachusetts statute. The two provisions are not similar in terms. The federal regulation is simply that the directors may appoint the necessary officials and remove them at pleasure. The only case that has come to our notice in which this provision has been considered is the case of

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Harrington v. *First National Bank of Chittenango*, 1 Thomp. & C. 361 (N. Y. Sup. Ct.). There a teller, who had been employed for a year, was discharged before the expiration of the year, and sought to recover compensation for the full term. The court held that the appointment was subject to a right of dismissal given the defendant by law. The decision goes no further than the express provision of the statute. As is said in 2 Morse on Banks, Part II., § 108 (d), the cashier of a national bank cannot be *irrevocably* appointed for a definite time. It is evident that the further statement in § 109, that a national bank cannot hire its officers for any specified time, was not intended to convey a broader meaning.

The Massachusetts statute contemplated a termination of the incumbency by an act removing or superseding the incumbent, which implied a continuing office. We see nothing in the language of the bank act which requires that a limited appointment under it be treated as of this character. The provision that an officer may be dismissed at pleasure can apply as well to an appointment limited to a given time as to an appointment for an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminable at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the directors, will continue for the period designated, and expire by its own limitation. There is nothing in the statute which requires us to hold that this surety contracted with reference to an unlimited period, when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors; it was the filling of a vacancy occasioned by the limitation of their previous appointment.

It remains to determine whether the defendant's liability is affected by the provision of the plaintiff's by-law, that the cashier should be appointed to hold his office during the

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pleasure of the board. It is claimed by defendant's counsel that this provision does not contemplate an appointment for an indefinite period; but in disposing of the point stated we shall assume that it does. It thus becomes necessary to consider whether the surety shall be held to have contracted with reference to the term contemplated by the by-law, or the term fixed by the vote of the directors in making the appointment.

The case cannot be put on the ground that the corporation had, by long and uniform practice, made the office an annual one, notwithstanding the provision of its by-law. This bond was given at the cashier's first election, and the case does not show what the previous course of the corporation had been. But, irrespective of any previous action of a similar character, we think the liability of the surety is to be determined with reference to the appointment as made. The case discloses nothing to place the surety in any other position as regards the by-law than that of a stranger; and the doctrine is that by-laws of this nature are merely provisions for the government of the corporation, that strangers are not bound to know them, and that notice of them will not be presumed. Mor. Priv. Corp. §§ 500, 502, 593. The early decisions to the contrary in New York have been ignored in recent cases. *Rathbun* v. *Snow*, 123 N. Y. 343: 10 L. R. A. 355. But if the surety were to be held charged with notice of the by-law, we think his liability would not be extended by it. The by-law, and the vote making the appointment, were expressions of the same authority. It is not necessary to consider what the situation may be when the by-law is adopted by one quorum and the appointment made by another, or when the votes are taken at meetings held upon different notices; for the case does not present these questions. The identical power which made the by-law could formally abrogate it, or ignore it in a particular instance. It was dispensed with for the time being when a vote inconsistent with it was passed; and having been disregarded in

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limiting the cashier's appointment, it cannot now be invoked to extend the liability of his surety.

The instrument in question in this suit is in form a bond, but without seals. Such an instrument is a valid contract obligation, if executed upon a sufficient consideration and delivered to take effect as security. *United States* v. *Linn*, 15 Pet. 290.

Judgment reversed and cause remanded.

NOTE. For a contrary holding, see *Westervelt* v. *Mohrenstecher*, 76 Fed. Rep. 118, which appeared after this opinion was in the hands of the reporter.

GREGG & CO. *vs.* J. H. BEANE.

October Term, 1895.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Custom and Law—Due Diligence in Presenting Check.

The payee of a check drawn upon a bank in another place should forward it for collection, by the next secular day after he receives it, to some person in the place where such bank is located, who should present it for payment by the day after it has reached him in due course of mail.

Where a check which would have been paid had it been forwarded and presented in accordance with this rule, arrives too late for collection in consequence of being forwarded through various collecting banks, though in the usual course of business, the drawer is released.

The fact that a check was forwarded for collection in the usual way is not conclusive upon the question of diligence. When the facts are found, due diligence is a question of law.

No. 38, Acts of 1896, was passed upon announcement of this decision.

GENERAL ASSUMPSIT. Pleas, the general issue, payment and notice of special matter. Trial by court at the June Term, 1895, Addison County, *Ross*, C. J., presiding. Judgment for the plaintiffs. The defendant excepted.

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W. W. Ryder and *W. H. Bliss* for the defendant.

There was nothing to prevent the plaintiffs' sending the check directly, as the law requires; in which case it would have been paid. They chose to send it circuitously, through three intermediate banks, at a loss of three or more days, one at least of which was vital. There was a lack of due diligence and the loss should fall on the plaintiffs. *Purcell* v. *Allemong*, 22 Gratt. (Va.) 739; *Smith* v. *Miller*, 43 N. Y. 171; 2 Morse on Banks, § 421; *Himmelmann* v. *Hotaling*, 40 Cal. 111; *Hazelton* v. *Colburn*, 1 Robertson (N. Y.) 345, 348; *Jackson Ins. Co.* v. *Sturges*, 12 Heisk. (Tenn.) 339.

The finding by the court below "that the plaintiffs in collecting said check pursued the ordinary and usual course, and that there was in that course no unusual or unnecessary delay in forwarding the check for collection," was without the province of the court as finders of fact and is nugatory. The question whether there was unnecessary delay, upon the facts found, is purely a question of law. The rule covering this case is laid down in 2 Morse on Banks (3 ed.) §§ 421, 421 (c); 2 Dan. Neg. Inst. p. 619, §§ 1590, 1592; Byles on Bills (Wood's ed. 1891) 20; 3 Rand. Com. Pap. § 1106; Story, Pr. Notes, § 493; Bigelow, Bills Notes and Cheques, 55, 56. The intermediate banks were the plaintiffs' agents. *Exchange National Bank* v. *Third National Bank*, 112 U. S. 276.

Button & Button and *Stewart & Wilds* for the plaintiffs.

All that was required of the plaintiffs was reasonable diligence, and that is a mixed question of law and fact.

Upon this point the English and American cases are uniform. *Rickford* v. *Ridge*, 2 Camp. 537; *Serle* v. *Norton*, 2 Mood. & R. 401; *Bond* v. *Warden*, 1 Colly. 583; *Hare* v. *Henty*, 30 L. J. C. P. 302; *Hopkins* v. *Ware*, L. R. 4 Ex. 268; Chalmer's Bills of Exchange Act, No. 74; *Ritchie* v. *Bradshaw*, 5 Cal. 228; *Bridgeport Bank* v. *Dyer*, 19 Conn. 136; *Allen* v. *Kramer*, 2 Ill. App. 205; *Montelius* v. *Charles*, 76 Ill. 305; *Marrett* v. *Brackett*, 60 Me. 524; *Selby* v.

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McCullough, 26 Mo. App. 66; *Middletown Bank* v. *Morris*, 28 Barb. 616; *Mohawk Bank* v. *Broderick*, 10 Wend. 304; *Cox* v. *Boone*, 8 W. Va. 500.

What is reasonable diligence is a question of fact, depending upon the usage of trade and the special circumstances of the case. Where one holds a check drawn on a distant bank the courts have been unwilling to adopt a general rule. The result of the cases seems to be this: The party receiving the check has a clear day for presenting or forwarding it. If instead of presenting he forwards it, was he acting reasonably in so doing? See cases *supra* and *Brown* v. *Olmsted*, 50 Cal. 162; *N. Y. R.* v. *Smith*, 4 N. J. L. J. 34; *Jackson Ins. Co.* v. *Sturges*, 12 Heisk. (Tenn.) 339; *Wallace* v. *Agry*, 4 Mason, 336; *Stephens* v. *McNeill* 26 Barb. 651.

Consequently, whether reasonable diligence has been used is a mixed question of law and fact to be decided by the jury under the direction of the court. Norton, Bills and Notes, 256, 257; Wood's Byles on Bills, 183, and cases *supra*.

In all cases where a general custom exists in regard to the time and manner of presentment it is conclusive upon the question of reasonable diligence. *Bond* v. *Warden*, *supra; Hare* v. *Henty*, *supra; Prideaux* v. *Criddle*, L. R. 4 Q. B. 455; *Appleton* v. *Sweetapple*, 3 Dougl. 137; Bills of Exchange, Act, No. 74; *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 651; *Marrett* v. *Brackett*, *supra*.

The County Court as triers of fact have found that the plaintiffs did use reasonable diligence. This finding is conclusive.

MUNSON, J. The plaintiffs claim to recover the amount of a check drawn in their favor by the defendant on S. M. Dorr's Sons, private bankers at Bristol, Vt., and mailed them in payment of an indebtedness. The check was received by the plaintiffs at their place of business in Trumansburg, N. Y., on the ninth of August, and was forwarded on the same day to the First National Bank of Ithaca, N. Y., for collection. On the tenth of August the

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bank at Ithaca mailed the check for collection to its reserve agent, the Fourth National Bank of New York City. This bank received it on the eleventh of August, and on the twelfth mailed it for collection to the Merchants National Bank of Burlington, one of the banks through which it made its collections in Vermont. The thirteenth was Sunday. The Burlington bank received the check on the morning of the fourteenth, at an hour which did not permit of its being sent to Bristol by the morning mail of that day. The banking-house of S. M. Dorr's Sons closed its doors on the fourteenth at ten o'clock in the forenoon.

It is found that twenty-four hours is required for the transmission of mail between Trumansburg and Bristol; and, in the absence of any statement as to the hours of departure and arrival, it must be assumed from this general finding that a letter mailed in Trumansburg to a correspondent in Bristol would be received on the following day. There is no special finding in regard to mails from Ithaca, but it is evident from its location and connections that it is within the facts found in regard to Trumansburg. It appears then that if the Ithaca bank had mailed the check directly to some one in Bristol, it would have been received on the eleventh, and would have been presented by the twelfth, and paid. No claim inconsistent with this view is made in argument.

It is found that in collecting a check in the usual way the payee deposits it in a local bank, and that the local bank sends it to its reserve bank in Boston, New York, Albany or Troy, and that the reserve bank sends it to its correspondent bank nearest the bank on which the check is drawn, and that the correspondent bank sends it to the drawee. It is found, however, that in some cases a reserve bank receiving a check for collection sends it directly to the bank on which it is drawn; but it is also found that if this course had been pursued in the present instance, the check would not have reached Bristol in due course of mail until

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after the suspension. It is further found that in collecting this check the plaintiffs pursued the usual and ordinary course, and that there was not, in that course, any unusual or unnecessary delay.

The plaintiffs claim that the finding of the court below that this check was forwarded for collection in the usual way is conclusive upon the question of diligence. But this cannot be so, unless it be considered that any change of method which grows into a settled practice, of itself works a modification of the law. It can hardly be claimed that custom is so exclusively the test of diligence that the adoption of a particular practice by any class of business men leaves nothing for the determination of the court. When the custom of one period has resulted in the adoption of a definite legal rule, the development of a new custom will not effect a modification of the rule in advance of judicial sanction. The case shows the manner in which this check was forwarded for presentment, and when the facts are found due diligence is a question of law.

The rule in its most general statement requires the payee of a check to present it for payment with reasonable diligence. But the law goes further than this general statement, and determines what reasonable diligence is under ordinary circumstances. When the case presents only the simple facts of time, location and stated means of communication, the question of liability is to be determined by an application of the more definite rule. It is only when the case presents special circumstances which are claimed to warrant further delay, that the court is left without other guidance than the general requirement. This case discloses nothing in the nature of an excuse for delay.

It is well settled that a check must be presented to the bank on which it is drawn if the bank be in the same place with the holder, or forwarded by mail if the bank be in another place, by the next secular day after it is received, and that the depositing of the check in a local bank for

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collection does not give the holder the benefit of an additional day. So this check was forwarded neither earlier nor later than the law required; and the controversy is confined to the question whether it was forwarded in the proper manner. As presented by the findings, the question is whether the local bank was justified in forwarding the check through its New York correspondent. The defendant sustained no harm from the course taken by the New York bank in sending it to Burlington.

It is said in Daniel on Negotiable Instruments that when the payee receives a check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient if he forward it by post to some person in the latter place on the next secular day after it is received, and if the person to whom it is thus forwarded present it for payment on the day after it has reached him by due course of mail. If this be accepted as a correct statement of the rule, it would seem not to permit the collection through a correspondent so remote as to delay the presentment a day beyond the time so allowed.

It is true that the rule is sometimes stated to be that the check should be forwarded for presentation on the day after it is received, and that the agent to whom it is forwarded must in like manner present it, or forward it, on the day after he receives it. This phraseology might seem to contemplate the collection of a check by means of several agents. But statements regarding the forwarding of a check by successive holders will ordinarily be found to refer to checks drawn for the purpose of being put in circulation, or to questions arising between endorser and endorsee where a check given in payment has been diverted from its proper use. Statements applicable to such cases must not be taken to indicate that the requirement of diligence, as between payee and drawer, will be satisfied by a regular transmission upon successive days, if an improper number of agents be employed.

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The rule is ordinarily stated to be that the payee, or the local bank receiving it for collection, must forward it directly to the place of payment. It is said in Byles on Bills that the bank receiving it for collection cannot postpone the time of presentment by circulating it through agents or branches of the bank. In *Moule* v. *Brown*, 4 Bing. N. C. 266, the right of a branch office of the plaintiff bank to send through the home office, in accordance with the custom of the bank, was considered and denied.

We do not find that any modification of the rule as before stated has been recognized in recent cases. In *First National Bank of Wymore* v. *Miller*, 37 Neb. 500: 40 Am. St. 499, the question was as to the liability of the payee on his endorsement to the bank. The check was deposited on Saturday, the 31st day of May, and was drawn on a bank located at Courtland, 27 miles distant from the bank of deposit, and accessible by two daily mails. On receiving the check the Bank of Wymore mailed it to a bank in St. Joseph, Mo., for collection, and this bank mailed it to a bank in Omaha for collection, and the latter bank mailed it to the bank on which it was drawn. The court said the evidence did not show that this method of presentment was in accordance with any custom of bankers, but said further that if such a custom had been shown it would not have relieved the bank from liability. Without undertaking to lay down any general rule, the court said that in this case Tuesday, June 3d, would have been a reasonable time within which to make presentment. This was in accordance with the rule as stated by Daniel.

In *Gifford* v. *Hardell*, 88 Wis. 538: 43 Am. St. 925, a check endorsed by the defendant was delivered to the plaintiff's agent at Dousman on July 17th, and was at once mailed to the plaintiff at New Richmond, who received it on the 18th and at once delivered it to a local bank for collection. This bank had no correspondent in Milwaukee, and

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immediately mailed the check to its correspondent in Chicago. From Chicago it was forwarded to Milwaukee and presented on the 21st. If the check had been sent directly to Milwaukee from New Richmond it would have arrived in time for presentation on the 20th, and would have been paid. The trial court held that sending the check for collection by way of Chicago was not reasonably diligent, and directed a verdict for defendant. On appeal the judgment was sustained, the court saying that when the defendant delivered the check at Dousman he had a right to expect that the plaintiff or his agent would present it for payment within a reasonable time, instead of which it was sent to New Richmond, several hundred miles northwest of Milwaukee, and then sent back through Milwaukee to Chicago, and from there returned to Milwaukee. The court then stated how a check should be forwarded and presented in such cases; its rule corresponding to that given by Daniel. The rule is similarly stated in *Holmes* v. *Roe*, 62 Mich. 199.

In *First National Bank of Grafton* v. *The Buckhannon Bank*, 80 Md. 475, the plaintiff bank, located at Grafton, West Virginia, received on the 12th of January, in payment of a balance due it, a check on J. J. Nicholson & Sons of Baltimore, and on the same day forwarded it for collection to its correspondent bank in Philadelphia. The Philadelphia bank received it on the thirteenth, and at once mailed it to its correspondent bank in Baltimore. This bank received it on the 14th, and presented it to the drawee on the same day. The Court sustained this presentment, on the ground that the Grafton bank, having sent out the check one day sooner than was necessary, had it in Baltimore for presentment on the day required, notwithstanding its transmission through Philadelphia.

We think that if this rule of commercial law, stated in the various text-books, and affirmed by these recent cases, is to

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be modified in derogation of the rights of drawers of checks, it should be done by legislative enactment.

Judgment reversed and judgment for defendant.

NOTE. The disposition of this case was made known during the session of the legislature, and No. 38, Acts of 1896, was then passed.

STATE *vs.* JOSEPH WARNER.

October Term, 1895.

Present: ROSS, C. J., ROWELL, MUNSON, START and THOMPSON, JJ.

Exception—Evidence—Argument—Motion in Arrest.

No error is found in the charge, no exception having been taken to the omission now complained of, and that portion to which exception was taken being correct.

The child claimed that she was assaulted by the defendant in one of several sheds, and a witness for the State testified that he examined the sheds soon after the assault was alleged to have been committed and found in one of them the tracks of a man and a child. *Held*, that the court was justified in treating this as an item bearing upon the issue.

The State's Attorney, having testified in the case contrary to the testimony of the respondent, had a right to argue upon the theory that his testimony was true and the respondent's wilfully false. The court properly refused to charge that if there was any doubt as to which was right, the State's Attorney or the respondent, the respondent's version must be adopted.

A motion in arrest can be sustained only for matter apparent of record.

A motion to set aside a verdict will not be heard in this court on affidavits.

INFORMATION for assault with intent to ravish. Plea, not guilty. Trial by jury at the April Term, 1895, Franklin County. *Tyler*, J., presiding. Verdict, guilty, and judgment thereon. The respondent excepted.

The claim of the prosecution was that the respondent committed the assault upon a girl of eight years in a shed.

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The State's Attorney testified that the respondent, while in jail admitted to him that he was with the girl in the shed. The respondent upon the stand denied that he was in the shed and denied that he made the admission.

In argument the State's Attorney, referring to the contradiction, said, "I do not think a man who will go on the stand and make the contradictions this man made will stop at anything, even so heinous as the crime charged against him here today." To this remark the respondent was allowed an exception.

After verdict, the respondent moved that sentence be arrested and the verdict set aside on the ground that before the empanelling of the jury the State's Attorney had misled the respondent's counsel into the belief that he would not be used as a witness upon the subject of the respondent's admission to him, in consequence of which they omitted to challenge certain talesmen who would have been objectionable as former neighbors of the State's Attorney; and on the ground that they had been deceived as to what his testimony would be, by reason whereof they failed to object seasonably to the State's Attorney's evidence; and on the ground that the counsel for the prosecution in his closing argument made unwarranted statements of fact and unjustly contrasted the characters of the State's Attorney and the respondent. Affidavits were filed in support of the motion.

The motion was denied and the respondent allowed an exception to the denial, "if entitled thereto as a matter of law."

C. G. Austin, for the respondent.

The judgment should be reversed for misconduct of counsel. *State* v. *Hannett*, 54 Vt. 83; *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177; *Rea* v. *Harrington*, 58 Vt. 181; *Bullard* v. *B. & M. R. Co.*, 64 N. H. 27; *Perkins* v. *Burley*, 64 N. H. 524; *Coble* v. *Coble*, 79 N. C. 589; *Angelo* v. *The People*, 96 Ill. 209; *State* v. *Smith*, 75 N. C. 306; *Devries* v. *Phillips*, 63

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N. C. 53; *State* v. *Williams*, 65 N. C. 505; *State* v. *Underwood*, 77 N. C. 502; *Bulloch* v. *Smith*, 15 Ga. 395; *Mitchum* v. *State*, 11 Ga. 633; *Rolfe* v. *Rumford*, 66 Me. 564; *Ferguson* v. *State*, 49 Ind. 33.

The motion in arrest should have been sustained. *State* v. *Williams*, 27 Vt. 724; *Dow* v. *Hinesburgh*, 1 Aik. 35; *Stanton* v. *Bannister*, 2 Vt. 464; *Magoon* v. *B. & M. R. Co.*, *supra*.

Isaac N. Chase, State's Attorney, for the State.

The argument was justified by the evidence. *Rea* v. *Harrington*, 58 Vt. 181; *Proctor* v. *DeCamp*, 83 Ind. 559; *Combs* v. *State*, 75 Ind. 215; *Battishill* v. *Humphreys*, 64 Mich. 514; *Morrison* v. *State*, 76 Ind. 335.

No exception lies to the refusal to entertain the motion. *State* v. *Haynes*, 35 Vt. 565.

A motion in arrest reaches only matters of record.

MUNSON, J. The mother of the child alleged to have been assaulted was called to establish the fact that an immediate complaint was made. In spite of the efforts of counsel and court, and evidently from a failure to comprehend the limit of admissibility, she interjected some improper statements regarding the complaint. But the only part of her testimony covered by an exception was a direct affirmative answer to the question whether the child complained of having been ill-treated by anybody. The respondent also excepted to what the court charged in regard to this testimony; but his present contention is that the jury should have been told to disregard the improper portions of it. There was no error in the charge as given, for the court referred to the testimony merely as evidence that a complaint was made. The respondent cannot complain of the omission referred to, for there was no exception to a failure in that respect. He would undoubtedly have had the benefit of such an instruction if it had been suggested.

The child claimed that the assault was made in one of sev-

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eral sheds in a certain locality, and the state produced a witness who testified that he examined these sheds just after the assault was alleged to have been committed, and found in one of them the tracks of a man and a child. The court was clearly justified in referring to this as an item of testimony bearing upon the issue.

The State's Attorney testified to certain material statements of the respondent, which the latter denied having made. In commenting upon this denial in his argument to the jury, the State's Attorney said in substance that a man who would do that would stop at nothing. This argument was based upon the testimony, and cannot be held a legal error. The Attorney had a right to argue upon the supposition that his own testimony might be found true, and that of the respondent a deliberate perjury. Nor was the respondent entitled to a charge that if there was any doubt as to what passed between him and the State's Attorney, his own version must be adopted.

The respondent filed a motion in arrest of sentence, and that the verdict be set aside. The motion was based upon matters outside the record, and was supported by affidavits. The case comes up with the affidavits attached to the motion, and without any finding of facts by the court. A motion in arrest can be sustained only for matters apparent of record. *Walker* v. *Sargeant*, 11 Vt. 327. A motion to set aside a verdict will not be heard in this court on affidavits. *Mullin* v. *Rowell*, 56 Vt. 301.

Judgment that respondent takes nothing by his exceptions.

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RE FRANCIS McKEOUGH'S EST. *vs.* JOHN McKEOUGH, apt.

May Term, 1895.

Present: TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Home Place—Construction of Will.

A devise of "my home place where I now live" carries the testator's dwelling-house and its appurtenances, but not other dwelling-houses, occupied by his tenants, standing upon the same lot; though the testator acquired the title to the whole lot at one purchase and ever after held and controlled it as one parcel, using some portions of the leased premises for his own convenience.

APPEAL FROM PROBATE. Trial by court at the March Term, 1895, Chittenden County, *Ross*, C. J., presiding. Judgment that the appellant, by the clause of the will in question, took the use of the entire property. The estate excepted.

Parol evidence was introduced from which the court found the facts recited in the opinion. To the admission of all such evidence the estate excepted "on the ground that there was no ambiguity, latent or otherwise, which would permit its reception."

H. S. Peck and *Elihu B. Taft* for the estate.

There is no ambiguity in the language. "Home place" is synonymous with "homestead" and means the dwelling in which one resides. Webster Dict. "Home;" I Bouv. Law Dict. 754, and cases; I Abb. Law Dict. 567; *Cook* v. *McChristian*, 4 Cal. 23; *Ackley* v. *Chamberlain*, 16 Cal. 181; *Hoitt* v. *Webb*, 36 N. H. 158; *Austin* v. *Stanley*, 46 N.H. 52; *Barney* v. *Leeds*, 51 N.H. 253; *Backus* v. *Chapman*, 111 Mass. 386; *Gregg* v. *Bostwick*, 33 Cal. 220; *Estate of Delaney*, 37 Cal. 176.

The occupation necessary to create a homestead under the statute must be personal, not by tenant. *True* v. *Morrill*, 28 Vt. 672; *Philleo* v. *Smalley*, 23 Tex. 502.

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If the testator had used the words, "my home place," only, there would have been some room for contention, but when he added the words, "where I now live," his meaning was made perfectly clear.

I Redf. Wills (4 ed.) 502; Wigram's Prop. I and II. The intention of the testator must prevail, and must be gathered from his words. *Smith* v. *Bell*, 6 Pet. 74; *Tucker et. al.* v. *Seaman's Aid Society*, 7 Met. 188; *Spencer* v. *Higgins*, 22 Conn. 521; Redf. Am. Cas. on Wills, 552.

The description being clear, parol evidence was unnecessary and so inadmissible. I Redf. Wills (4 ed.) 503; Wigram's Prop. VII and cases cited in No. 4, 15, 16, 31, 35.

But if parol evidence was admissible, then upon the facts found the same construction must be adopted.

W. H. Bliss and *R. E. Brown* for the appellant.

Evidence is admissible to ascertain what is included in the description. I Jar. Wills, (ed. 1881) 447: (ed. 1893) 431, 432; *Maeck* v. *Nason*, 21 Vt. 115; Wigram's Prop. V; Schouler, Wills § 590; *Doe* v. *Collins*, 2 T. R. 498; *Goodtitle* v. *Southern*, 1 M. & Sel. 299.

The court below construed the will correctly. The "home place" includes the house and adjoining land,—the home farm. The fact that the testator rented certain tenements on the premises does not deprive the premises of their character of "homestead" or "home place." I Bouv. Law Dict. 754 and cases; *West River Bank* v. *Gale*, 42 Vt. 27; *Waggoner* v. *Ball*, 95 N. C. 323.

The court below having found in effect that it was the intent of the testator to include the whole lot and there being evidence in support of this finding, it is not open to revision here. *Backus* v. *Chapman*, 111 Mass. 386.

MUNSON, J. The testator's will contains the following clause: "After the decease of my said wife, I give to my son, John McKeough, the use, during his natural life, of my home place where I now live, on the west side of Champlain street in said Burlington." We are called upon to determine

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what property is covered by the expression "my home place where I now live."

The testator lived in a house which stood upon the corner of a lot on which there were three other buildings, leased by the testator and occupied as dwellings. He obtained the lot at a single purchase in 1850, and held it without interruption until his death. At the time of his purchase there was a small house on the northeast corner of the lot, which he soon removed to the rear of the lot, where it has since stood. Soon after this he moved a building upon the northeast corner, which he fitted up as a dwelling and lived in during the remainder of his life. Some years later he moved a building onto the southeast part of the lot, and finished it into two tenements. A few years before his death he moved into the space between this double tenement and the house on the rear of the lot another building, which he used for two or three years as a barn and shop and then turned into a tenement. From this time until his death he had a shop in the basement of the southerly tenement in the double building.

The double tenement above mentioned was so located as to leave a passage of seven feet between it and the house occupied by the testator, and a passage of sufficient breadth for teams between it and the south line of the testator's land. A fence, which was substantially in alignment with the north side of this double tenement, extended from its northwest corner to the front line of certain structures occupied by the testator. These consisted of a chicken-house and chicken-yard which together extended from the north line of the testator's land to the line of the fence above described, and a coal and wood shed which adjoined the chicken-yard, but was south of the line of the fence and in the rear of the double tenement. It will be seen by this description that the house occupied by the testator stood in an enclosed yard, the south line of which was formed by the side of the double tenement and the fence, and the west line by the rear walls of the chicken-house and

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yard. The only structure occupied by the testator outside of this was the coal and wood shed, which formed a continuous row with the chicken-house and yard.

The place enclosed as above stated could be entered from the street by a narrow gate between the testator's dwelling and the double tenement, and through a gate in the fence above described, located at the northwest corner of the double tenement. A necessary outbuilding, used in common by the testator and the occupants of the north part of the double tenement, stood in this enclosure. A cesspool connected with the testator's house and with both parts of the double tenement, was located under the fence already described. The occupants of the north part of the double tenement hung out their washings in this yard, and children from all the tenements were allowed to play there. Teams were never driven into it. The wagon entrance for all the buildings was through the passage between the double tenement and the south line of the testator's land. The testator worked up his wood and deposited his ashes in the open space between his wood-shed and the double tenement. He frequently piled considerable quantities of lumber and other material along the south and west lines of his land, near the two rear tenements. There was no other division of the lot than that above indicated, and no particular parts of the vacant space around the tenements were assigned to the different occupants.

The question presented suggests a consideration of the word "homestead." "Stead" originally meant place or spot. This meaning is now obsolete, except as preserved in compound words. Webster defines homestead as the home place. It is a house occupied by its owner as a dwelling, with the outbuildings and land used in connection with it. It is that part of a man's premises where he lives and has his home. Except as modified by limitations of value and questions of intent, the legal use of the term is the same as the popular use. So in determining what a devisee will take

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under the expression "my home place where I now live," it will be well to consider what can be held as a homestead under the statutes.

It is said to be a general rule that buildings rented to others cannot constitute a part of the lessor's homestead, even though erected on the same lot with his dwelling. 70 Am. Dec. 350 note. It is held that when one part of a double house, having distinct entrances but a common yard, is occupied by the owner, and the other part let to a tenant, only that part occupied by the owner can be held as his homestead. *Tiernan* v. *Creditors*, 62 Cal. 286; *Dyson* v. *Sheley*, 11 Mich. 527. In the first of these cases the statute protected the dwelling house in which the claimant resided; but, although there was only one building, the court said the claimant "did not reside in the structure which was occupied by his tenants" In the second case, the statute exempted a limited quantity of land, with a dwelling house thereon and its appurtenances, owned and occupied by the debtor. Here, the occupancy of the yard by the debtor and his tenants was in some respects like that had by the testator and the occupants of his double tenement of the space immediately in the rear of their houses. A penstock used by both families was located in the middle of the lot. A necessary outbuilding used by both stood entirely on the rented half. The court considered that this use of the rented part of the yard by the owner did not indicate a right therein predominant over that of the tenant, and did not render the whole of the yard exempt. A still greater similarity to the facts of the present case is found in *Ashton* v. *Ingle*, 20 Kas. 670: 27 Am. Rep. 197. There, the debtor owned an L shaped piece of ground, the branches of which abutted on different streets. The lot was fenced in one enclosure, but for convenience the court treated it as divided into two parcels. On the south parcel were the debtor's dwelling house and outbuildings. On the north parcel were two small houses occupied by his tenants. A clothes-line

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stretched from one of the tenements onto the south parcel, and was used jointly by the occupants of both parcels. A walk extended from the south parcel across the north parcel, which was sometimes used by the occupants of the south parcel. No importance was attached to this incidental use of the north parcel by the owner. The court considered that when houses were rented with the intention that they should become the homes of independent families, and they in fact became such homes, they could not longer be regarded as a part of the lessor's home; and confined the debtor's homestead to the south parcel. Mr. Thompson, in his work on Homesteads, deduces from the cases the rule that houses built for the purpose of being rented to tenants, and yielding to the owner a revenue separate from any use immediately connected with his dwelling, form no part of his homestead.

The use of a part of the basement of the double tenement by the testator as a shop cannot save the building from the operation of the rule above presented, as far as it may be considered applicable to a case like this. It is held that the letting of rooms in a building primarily used as the owner's dwelling will not deprive the building of its character as a homestead. 70 Am. Dec. 350 note. It must also be held that the owner's maintenance of a shop in a house primarily used for renting will not make the building a part of his homestead. Nor do the facts that the testator's only entrance for teams was in common with that of his tenants, and that he frequently deposited loads at points easily accessible from this common way, require that the whole property be considered his home place. This use was not inconsistent with a complete enjoyment of that portion of the property by others, in everything essential to an independent residence.

The decisions above referred to were made in controversies concerning the rights of debtors; and while they must be regarded as somewhat helpful in the construction of this devise, they are by no means necessarily determinative of it.

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The question here is as to the testator's intention; yet that intention is to be gathered from the language used, with such aids in applying the language as the law permits and the case affords. But, having in mind that these decisions are of use only as they throw light upon the ordinary meaning and effect of the words employed, we think the expression "my home place, where I now live," can hardly be held to pass with the buildings occupied by the testator a group of tenement houses, although located upon the same lot as determined by unity of purchase and unbroken ownership. It is true that the testator lived upon the original lot on which all these dwellings were placed, and that if the conditions absolutely forbade its being regarded as separated into different lots, it would be necessary to consider it his home place as distinguished from other lots. But, when read in the light afforded by the character of the property, the language of the testator seems to call for a division subordinate to that effected by the intervening lands of another. It is not necessary to every division of a lot that it be separated by erections upon the land or the exact bounds of a deed or written lease. When the testator located upon different parts of this lot separate dwellings, he gave to those parts the character of different house lots, notwithstanding the unity of ownership and the lack of definite dividing lines. But he made a more marked separation of the lot into two parts by the different uses to which he devoted it. One part he fitted up to occupy as his home. The other part he fitted up for the purpose of renting. This distinction was emphasized by the fence which completed his private enclosure—the only fence upon the tract. The house in which he lived and the buildings prepared for use in connection with it, with his enclosed yard and his right of convenient access, fully answer the description of a home place. We think the language of the will points to that which the testator occupied as a home, to the exclusion of that from which he derived his income.

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As we hold for the estate upon the facts reported, we assume without consideration the competency of all the testimony received against its objection.

Judgment reversed and judgment that the appellant takes under the will the use of the house in which the testator lived and of the chicken-house and yard and coal and wood-shed used by the testator, together with the yard separated from the other portion of the premises by the fence in connection with the chicken-house and yard, and the passage-way between the house above mentioned and the double tenement, with a right of access for teams to the space in the rear of the house as enjoyed by the testator; to be certified, etc.

Thompson, J., dissents.

RE FRANCIS McKEOUGH'S EST. *vs.* JOHN McKEOUGH, apt.

May Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Ambiguity—Construction of Will—Evidence.

Where the language of a devise is equally applicable to two objects extrinsic evidence is sometimes admitted to prove the testator's intent as an independent fact. But where the extrinsic facts disclose only one object that answers the description, such evidence is not admissible.

The trial below was by the court, and upon the facts found, judgment was rendered that the words, "my home place, where I now live," included premises in addition to the testator's own dwelling-house. But such judgment was the court's conclusion of law, not a finding of what the actual intent was, and is therefore revisable in this court.

REARGUMENT. The foregoing decision was announced at the May Term, 1895; whereupon the appellant filed a motion for a rehearing, stating as grounds thereof that the judgment of the court below was based upon the finding of that

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court that the testator in fact intended the devise to include the entire property, and that such finding and judgment are conclusive, whereas the court in its opinion has wholly overlooked this question. Upon said motion the certificate was stayed and the cause continued for reargument, which was heard at the January Term, 1896.

R. E. Brown and *W. H. Bliss* for the appellant.

If no error is found in the admission of evidence the judgment should be affirmed. The only objection made was that there was no ambiguity in the language of the devise. But it is a typical case of latent ambiguity. The words "my home place, where I now live," apply equally to two objects, that is, to the entire lot and to the small corner on which the testator's dwelling was located. Therefore extrinsic evidence was admissible to show the intent of the testator as to what property was covered by the devise. I Jar. Wills (ed. 1893) 436, 437; *Conn. & Pass. R. R. Co.* v. *Baxter*, 32 Vt. 805, 812; *Maeck* v. *Nason*, 21 Vt. 115; *Vt. Bap. St. Conv.* v. *Ladd*, 59 Vt. 5; *Button* v. *Am. Tract Soc.*, 23 Vt. 336; I Green. Ev. § 289; *Roberts* v. *Button*, 14 Vt. 195; *Kimball* v. *Lancaster*, 60 N. H. 264; *Waggoner* v. *Ball*, 95 N. C. 323; *Doe* v. *Collins*, 2 T. R. 498; *Goodtitle* v. *Southern*, 1 M. & Sel. 299; Schouler, Wills § 590; *Hiscocks* v. *Hiscocks*, 5 M. & W. 363, 367; *Castle* v. *Fox*, L. R. 11 Eq. 542; *Winter* v. *Norton*, 1 Oregon 42, 45; *Benham* v. *Hendrickson*, 32 N. J. Eq. 441; Steph. Dig. Ev. 169 (8); *Bodman* v. *Am. Tract Soc.*, 9 Allen 447; *Sargent* v. *Adams*, 3 Gray 72; *Patch* v. *White*, 117 U. S. 210, 217; *Ayres* v. *Weed*, 16 Conn. 290, 298; *Lynde* v. *Davenport*, 57 Vt. 597.

The exceptions do not state what evidence was admitted but only state certain pertinent facts found therefrom. Hence the question is whether any extrinsic evidence was admissible.

The court found the fact that the testator intended to give the appellant the use of the entire property. This finding is not revisable here. *Backus* v. *Chapman*, 111 Mass. 386;

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Cleverly v. *Cleverly*, 124 Mass. 314, 316; I Thomp. Trials § 1333, 1083; *Brownfield* v. *Brownfield*, 12 Pa. 136; Wigram's Prop. VII; Green. Ev. § 287, note 3; *Black* v. *Hill*, 32 Ohio St. 313, 319; *Middlebury* v. *Case*, 6 Vt. 165, 168; *Phelps* v. *Bellows Est.* 53 Vt. 539; *Roberts* v. *Welch*, 46 Vt. 164.

H. S. Peck and *Elihu B. Taft* for the estate.

The only question for reargument is whether the lower court found the testator's intent as a matter of fact or adjudged it as a matter of law.

The county court acted as an appellate court of probate in construing the will. There was no right to a jury trial (V. S. 2595; *In re Weatherhead*, 53 Vt. 655) but even if the case had been tried by jury the court would have required special verdicts and rendered judgment thereon.

This in effect it did by propounding to itself certain questions and answering them as shown by the facts recited in the exceptions, and thereupon rendering its judgement of law construing the clause in the light of these answers. Nowhere except in this act of judicial construction does the court say that the testator intended to give the appellant the use of the whole property.

MUNSON, J. This case has been heretofore disposed of upon the theory that the decision of the county court involved a matter revisable in this court, and it is now before us upon a rehearing of that question. The case was tried below by the court, and the appellant contends that the decision of that court was no more than a finding of fact as to the testator's intent, and was therefore final.

The county court received certain evidence from which it found the facts recited in the former opinion. Extrinsic evidence is ordinarily received to aid the court in arriving at the testator's intention by a construction of the terms of his will, but it is sometimes received to prove the testator's intention as an independent fact. This is the case when the

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words of the will "are applicable indifferently to more than one person or thing," and so present nothing to determine which person or thing was intended. But when the extrinsic facts disclose but one person or thing that adequately answers the discription given, this evidence of intention cannot be received. The disposition must then be in accordance with the intention expressed in the will, whatever the testator's actual intention may have been.

If the county oourt had been called upon to determine which of two parcels the testator intended to devise by language which applied with equal accuracy to each, the appellant's contention might be sustained. But we think the inquiry in this case cannot properly be treated as of that nature. The question to be determined was whether the whole or a part only of the testator's premises on the west side of Champlain street was covered by a devise of his home place. The testator had but one home place; and the only office of the extrinsic evidence was to show of what that place consisted. The evidence received raised no question of intent independent of construction. The intent was to be derived from the language of the will construed in the light of extrinsic facts. So the court's ascertainment of what passed under the devise was a determination of construction, and not the mere finding of a fact.

But the appellant contends that the nature of the inquiry was such that there can be no revision of the finding, even though it involved a construction of the will. This claim is based upon what is asserted to be the rule of procedure in jury trials; and we are referred to authorities which say that when the meaning of a writing is to be gathered from a consideration of both its language and the collateral facts, the whole matter is necessarily left to the jury and the entire inquiry becomes one of fact. But we do not consider it necessary to inquire what the procedure should be when a question of this nature is to be determined in a jury trial. This inquiry was had by the court, and the nature of the

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inquiry did not convert that tribunal into a mere trier of fact. It ascertained the facts to aid it in the exercise of its judicial function, and then gave its interpretation to the testator's language.

It is evident that the court below had this understanding of its decision. It considered the question to be "what property is included in the terms 'my home place where I now live,' " and received evidence of the situation and use of the property "to determine the construction to be given to these words." It found and stated the facts, and "on these facts * * adjudged that the appellant, by this clause of the will, took the use of the entire property." It did not dispose of the inquiry as one of fact, but as one of construction.

Order of stay of certificate vacated.

Start and *Thompson*, JJ, dissent.

EDWARD SHUM *vs.* C. A. CLAGHORN.

January Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START, and THOMPSON, JJ.

Condition Subsequent—Forfeiture—Description in Chattel Mortgage.

A condition in a deed, that if the grantee shall support the grantor the instrument shall be in full force, otherwise be void, is a condition subsequent and the title vests, where possession of the property conveyed is evidently required for the performance of the contract.

Such a grantee has a title which may be transferred subject to defeat by non-performance and claim of forfeiture.

Non-performance alone without a claim of forfeiture will not defeat the title.

In aid of the description in a chattel mortgage the property will be assumed to be the property of the mortgagor.

In a chattel mortgage the description of an animal by age, sex and color is *prima facie* sufficient.

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REPLEVIN. Plea, not guilty. Trial by court at the September Term, 1895, Rutland County, *Ross*, C. J., presiding. Judgment for the return of the property replevied. The plaintiff excepted.

The court found the following facts. The plaintiff being on May 3, 1893, the owner of a farm in Wallingford, and personal property thereon, including the mare replevied in this action, conveyed the farm and personal property to his son, Joseph E. Shum, by warranty deed with a condition for the support of the plaintiff and his wife. The son took possession and began to perform the condition, but in September of the same year, trouble having arisen in the family, the son removed from the farm, having previously arranged with the defendant, a merchant, to furnish the plaintiff such things as he needed. After the son's removal the plaintiff, with occasional help from the son, carried on the farm. Some of the personal property embraced in the deed was sold with the consent of the plaintiff and his son and the avails applied on the son's debts, contracted for the plaintiff's support, and on debts of the plaintiff assumed by the son, and some of it was used for the son's benefit while carrying on the farm. The plaintiff continued to treat the son as performing the conditions of the deed until a few days later than February 12, 1894; although the court find that he might rightfully have treated the deed as void upon the son's removal from the farm had he so elected. February 12, 1894, the son mortgaged the mare in question to the defendant to secure an account due from the son to the defendant for articles furnished, some of them for the plaintiff's support and some of them for the son's use; and the mortgage was duly recorded the same day. On the same occasion the son executed a quitclaim deed of the farm to the plaintiff, except delivery, which was not made until three or four days later. When he did deliver it he did not tell the plaintiff that he had mortgaged the mare. The plaintiff received the quitclaim deed, expressing his willingness to give up the con-

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tract of May 3, 1883, and his satisfaction with what he was receiving back. Learning, a few days later, of the chattel mortgage, he saw his son but made no offer and expressed no desire to give up the quitclaim deed. Subsequently the defendant took the mare on foreclosure proceedings, when the present action was brought.

The chattel mortgage, which was received in evidence against the plaintiff's exception, describes the mortgaged property in these words only, "one four-year-old mare, cream color."

Butler & Maloney for the plaintiff.

The chattel mortgage is invalid for want of an adequate description of the property. *Huse* v. *Estabrooks*, 67 Vt. 223; *Parker* v. *Chase*, 62 Vt. 206: Jones Chat. Mort. 856; *Kimball* v. *Sattley*, 55 Vt. 285; *Andregg* v. *Brunskill*, 87 Iowa 351: 43 Am. St. 388.

Joseph E. Shum had no right to mortgage the mare. His title was only conditional and the condition was never performed. *Hogle* v. *Clark*, 46 Vt. 418; *Bradley* v. *Arnold*, 16 Vt. 382; *West* v. *Bolton*, 4 Vt. 558; *Martin* v. *Eames*, 26 Vt. 476; *Burnell* v. *Marvin*, 44 Vt. 277; *Cobb* v. *Hall*, 29 Vt. 510.

Such a conditional sale does not come within the statute in respect to record. *Dickerman* v. *Ray*, 55 Vt. 65; *Batchelder* v. *Jenness*, 59 Vt. 104.

There was no possession in the son and the defendant was charged with notice that the title was where the possession was. *Chase* v. *Snow*, 52 Vt. 525; *Parker* v. *Kendrick*, 29 Vt. 388; *Flanagan* v. *Wood* 33 Vt. 343.

C. L. Howe for the defendant.

The conveyance by the plaintiff to his son was upon condition subsequent and the property vested in the son upon delivery. No action for the possession could be maintained by the plaintiff against the son until condition broken, and accordingly none can be maintained against the

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son's grantee. In this case the condition was never broken and never can be, for by the plaintiff's acceptance and retention of the quitclaim deed the condition was discharged. II Wash. Real Prop. (5 ed.) Chap. 14, § § 3, 4 and 9; *Buckmaster* v. *Needham*, 22 Vt. 617; *Lamb* v. *Clark*, 29 Vt. 273; *Norton's Admrs.* v. *Perkins*, 67 Vt. 203.

MUNSON, J. This action is replevin for a mare, which was covered by a conditional deed executed by the plaintiff to his son, and was afterwards mortgaged by the son to the defendant. The condition in the deed is as follows:

"Provided nevertheless the said Joseph E. Shum or his heirs, is to care for us according to our age and infirmities, and if he does thus care for us, then this deed to be and remain in full force and virtue in law; but if he fails or neglects to do so, then this instrument to be null and void."

The grantee entered upon the performance of this condition, but failed to carry it out; and the plaintiff now claims that the condition is such that the title would not pass until full performance. The treatment of the case depends upon whether the condition is precedent or subsequent.

It is well settled that the creation of a condition of either class does not depend upon the use of any particular words, and that the intention of the parties is to be gathered from the whole instrument. But it is often difficult to determine the nature of these provisions, and many rules have been given to aid in their classification. It is said by one writer that "if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent." 2 Wash. Real Prop. 7 (5th ed.).

This rule may perhaps properly be treated as decisive of the construction when the words themselves are not conclusive. It certainly requires that the ordinary terms of affirmance and avoidance be held to create a condition subsequent, when employed in a deed given to provide for the support of

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the grantor. The nature of the contract contemplates the possession and use of the property in the performance of the condition. We hold therefore, that the condition above recited is subsequent; and it would appear from what is said in *Rollins* v. *Riley*, 44 N. H. 9, that this holding accords with the weight of authority.

When property is conveyed upon condition subsequent, the title vests in the grantee, subject to be defeated by a non-performance of the condition and a claim of forfeiture by the grantor. The existence of the condition does not deprive the grantee of the right to transfer the property, and the title of a transferee will be valid until defeated as above stated. But a failure to perform the condition will not defeat the title, unless the grantor takes advantage of the breach. 44 Am. Dec. 743 note.

The case finds that there was a breach of the condition of this deed prior to the delivery of the mortgage to defendant, but that the plaintiff did not elect to avoid the deed, and continued to treat it as in force until after the mortgage was delivered. So the title was in the grantee of the conditional deed at the time the mortgage was given, and passed thereby to the defendant; and the question is, whether it was afterwards defeated by the manner in which the conditional estate was terminated.

It appears that about three days after the mortgage was delivered, the grantee of the conditional deed, in an interview which was understood to relate to the personal property as well as the real, delivered to his grantor, the plaintiff, a quitclaim deed of the farm, and that the plaintiff then expressed his willingness to give up the contract, and said that he was satisfied with what he was getting back. This cannot be considered an assertion of the rights accruing to the plaintiff from the breach. The conditional estate was terminated by mutual agreement, and not by an enforcement of the forfeiture. This left the defendant's title to the mare unimpaired.

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The situation is not affected by the fact that the plaintiff was not aware of the mortgage at the time he took back the property. It appears that he learned of it within a few days and then saw his son in regard to it, but that nothing was said about giving up the quitclaim deed. The arrangement made with his son concerning the property was suffered to stand after he knew what had been done in regard to the mare.

But the plaintiff claims that the chattel mortgage is void for the want of a sufficient description. The property is described as "one four-year-old mare, cream color." There is no statement of ownership or location. We are aware that it has been held that no presumption of the mortgagor's ownership arises from the execution of the mortgage, and that a description which does not designate the property as belonging to the mortgagor will apply as well to any chattel which satisfies the description given, whoever its owner may be. But we think that as long as it is held that the sale of a chattel in possession is an implied warranty of the vendor's title, it should be presumed in aid of the description in a chattel mortgage that the mortgagor is the owner of the property he assumes to mortgage. Can it be said that the fact that the mortgagor claims to mortgage such a chattel is not enough to suggest inquiry with reference to his property? If it were found on inquiry that this mortgagor owned one cream colored four-year-old mare, and no other horse answering that description, could the inquirer have any doubt as to what property was mortgaged? Could the mortgagor raise any doubt in regard to it by saying that his neighbor owned a cream colored mare to which the description equally applied? We think this description should be given the same effect as if it read "one four-year-old mare, cream color, belonging to the mortgagor."

In *Huse* v. *Estabrooks*, 67 Vt. 223, we held that a description of a heifer as a two-year-old, without more, was

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insufficient. It was then said that a description must not be so uncertain as to apply equally to any property of the kind described, but must contain some statement concerning the property that would serve to distinguish it from other property of the same kind. The description here is more definite in that it designates a four-year-old mare that is cream colored. We think this is all that can reasonably be required to give a *prima facie* validity to the mortgage. Any attempt to gain greater certainty by a description of the animal itself must be by the designation of special marks not easily described with accuracy. A statement of size cannot properly be held essential to a general description; for it is useless as a means of future identification in the case of growing animals, and the period of growth is of uncertain duration. It is true that age, which is included in the description under consideration, is not universally available as a means of identification; for it cannot always be given when the animal is mortgaged, and if given, cannot always be determined of the animal which is claimed to be the one mortgaged; but it is an item of description which is ordinarily relied upon, and if stated in the mortgage, affords a means of identification whenever the age of the animal in question is ascertainable. When the color is given in connection with the sex and age, it completes an enumeration of the characteristics which constitute a general description. Nothing naturally pertaining to the animal remains beyond sex, age and color, to distinguish one from another to ordinary observation. If we go beyond these primary characteristics, we enter upon a series which is without natural limit, and which can never bring us to a description that is absolutely certain. However far we may go in the use of distinguishing marks, it may still be said that there is nothing to show that the mortgagor did not have another animal with the same marks. Whatever the minuteness of detail, it would always be necessary to negative the ownership of other animals of the same description.

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It is so nearly the universal rule that the location of property of this kind is easily ascertainable from the fact of ownership, that we think a statement of the town or farm where the animal is kept ought not to be required in addition to sex, age and color, to give the description *prima facie* validity. It certainly is not required by the rule which provides that the description shall be such as to enable a stranger to find the property by the inquiry which it suggests; for if one mortgages his two-year-old red heifer, and has but one such animal, the description contains everything necessary to the discovery and identification of the property. A statement of the location of the animal, or the designation of special marks, will often be necessary to perfect a description when the mortgagor has others of the same sex, age and color; but we think a mortgage ought not to be held invalid for the want of such further description, unless it appears that the mortgagor owned other animals answering the description given. To hold otherwise would be to make what might be a necessary matter of description in one case, essential to the validity of a mortgage in all cases. It was said in *Parker* v. *Chase*, 62 Vt. 206, that while a description need not be enough to enable one to find the property without inquiry, it must be such as to indicate the line of inquiry and furnish the basis of identification. This does not seem to indicate, and we do not understand, that a description must come as near as is practicable, in the circumstances of each case, to making extrinsic evidence unnecessary. We think that if any description other than a statement covering sex, age and color, is needed to distinguish the mortgaged animals from others owned by the mortgagor, it should be made to appear by the production of extrinsic evidence in impeachment of the mortgage. It not appearing that this mortgagor owned more than one cream colored four-year-old mare, we hold the mortgage sufficient.

Of course it is not intended to intimate that other methods

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of description may not be adopted, which might render unnecessary any or all of the items embraced in the description now passed upon.

Judgment affirmed.

Taft, J., dissents.

O. K. Brown, Adm'r *vs.* Town of Swanton.

January Term, 1896.

Present: Ross, C. J., Taft, Rowell, Munson, Start and Thompson, JJ.

Witness who has Searched Record—Evidence of Public Highway—Insufficiency and Notice of—Witness' Opinion—Rebuttal—Presumption from Failure to Call Witness.

The fact that there is not in the town clerk's office a record of the laying of a certain highway, may be shown by any one who has searched and knows, as well as by the clerk himself.

That a road has been maintained by the town is evidence that it is a public highway.

One question being whether a culvert had become too small by the crowding together of its walls, through the action of frost, witnesses were properly allowed to state that they had examined it at various times during several years preceding the accident, and had noted a gradual contraction of the space, and also to state that the town had knowledge of this condition.

The plaintiff was properly allowed to show that during the year before the accident a selectman of the defendant was notified that the sluice was too small to carry off the water; inasmuch as there was evidence tending to show that the defect in the covering of the sluice was naturally caused by such insufficiency in size.

As tending to show that the town ought to have known of the condition, a witness was properly allowed to testify that in the spring of several years before the accident he had seen the water running on top of the sluice.

A witness having described the quantity of water and the size of the sluice, was allowed to state that the sluice was not half large enough to carry off the water. *Held*, that, whether or not the statement was admissible as opinion, it was only another way of expressing what the witness

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had already stated as matter of fact, without objection, and its admission was not error.

The question being whether a certain trench was made by the water or by a man shoveling and leaving the dirt beside the trench, a witness who, in cross examination, had described the appearance of things was properly allowed to state, on re-direct examination, how far the dirt beside the ditch would go toward filling it.

The jury having viewed the sluice in April, 1895, a witness who had seen it then and also two years before, just after the accident, was properly allowed to state that it showed no substantial change.

The defendant gave evidence tending to show that the contraction of the walls had been caused by artificial means after the accident and shortly before the view taken by the jury. The plaintiff was, therefore, properly allowed to rebut this testimony by evidence, somewhat in detail, of measurements and comparisons, and was not necessarily to be confined to the general statement of witnesses that there had been no tampering with the walls.

The defendant having introduced witnesses who testified that they saw the deceased driving rapidly toward the place of the accident, it was not error to permit the plaintiff to show by witnesses who saw him when nearer thereto that he was then driving slowly.

To render the town liable it was not necessary that the precise defect which caused the accident should have been actually known to the town, or even that it should have existed so long that the town ought to have known of it, provided it resulted naturally from an insufficiency of which the town had ample notice.

There was some evidence in the circumstances of the accident that the deceased was in the exercise of ordinary care.

The court properly refused to instruct the jury that if the highway commissioner went over the road four days before the accident and saw no water running over the road and no sign that it had done so, the town was not negligent in failing to go over the road again.

Shortly before the accident an abutter upon the highway had told the commissioner that the sluice was frozen up, and the water running over the road and that he was likely to be damaged by the water setting into his cellar. *Held*, that the court properly refused to instruct the jury that this was no notice of any defect in the highway for purposes of travel.

Even if the town had no reason to expect that the stoppage of the water in the sluice would make the covering unsafe, yet if it did have that effect and the town failed in its duty to learn of and repair it within a reasonable time, it would be liable.

Both the mother and the wife of the deceased had personal knowledge upon a material question, but the plaintiff improved the wife, only, as a witness, although the mother was within call and able to attend. The defendant requested the court to instruct the jury that it was fair to infer from the failure to call the mother that the testimony of the wife was untrue. *Held*, that the instruction was properly refused.

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ACTION ON THE CASE, under R. L. 2138 and 2139, for damages to wife and next of kin resulting from the death of the plaintiff's intestate from an injury alleged to have been received through an insufficiency in the defendant's highway. Plea, the general issue. Trial by jury at the April Term, 1895, Franklin County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

R. O. Sturtevant, *E. A. Ayers*, *Ballard & Burleson* and *F. W. McGettrick* for the defendant.

The absence of a record of the highway should have been shown, if at all, by the town clerk. A layman cannot properly testify to the absence any more than to the existence of a record.

The plaintiff should not have been permitted to testify that the highway had been maintained by the town, for it was the same thing as stating his opinion upon a question which the jury was to determine. He should have been confined to distinct acts of the town. *Young* v. *Wheelock*, 18 Vt. 493; *Blodgett* v. *Royalton*, 14 Vt. 288: R. L. 3051-3074.

The testimony of the plaintiff that he, as selectman, about one year before the accident, had been notified by an abutter upon the highway that the sluice was too small and that the water was setting back into his cellar and likely to cause him damage, was inadmissible (a) as too remote, (b) as hearsay, (c) as having no tendency to show that the highway was insufficient for travel.

The testimony received in rebuttal of the defendant's claim that the sluice had been tampered with since the accident, was too extensive and minute. It should have been given in the opening. In rebuttal the plaintiff should have been limited to the experts' general statement of opinion that the sluice had not been interfered with.

The witness Brown should not have been permitted to state how far the dirt beside the trench would have gone towards filling it, for that was a matter of opinion.

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A verdict for the defendant should have been directed. There was no evidence that the deceased was in the exercise of due care.

D. G. Furman and *H. A. Burt* for the plaintiff.

MUNSON, J. The testimony of witnesses other than the town clerk was admissible to establish the fact that there was no record of the laying of the road. In *Hill* v. *Bellows*, 15 Vt. 727, where it is held that the certificate of the town clerk is not evidence that there is no record of a conveyance, it is said that legitimate proof of that fact would be the oath of the town clerk or of some one who had examined the records.

The fact that a road is a public highway may be established by evidence that the town has recognized it as such by expending highway money in its repair. *Page* v. *Weathersfield*, 13 Vt. 424. The testimony of O. K. Brown that this road had been maintained by the town was evidence tending to show that it was a public highway.

Plaintiff's intestate was injured by being thrown from his wagon while driving over a sluice, the top of which consisted of marble slabs covered with earth. Plaintiff claimed that this sluice was insufficient in size, and that the water had been retained until it had flowed across the road-bed and made a gully in the earth which covered the slabs. The theory of the defense was that the excavation had been made in such a manner and at a period so recent that the town was not liable because of it.

It appeared that the sluice was built in 1878, that the side walls consisted of single courses of large sized cobble stones, and that as originally laid the space between the walls was about eighteen inches. The plaintiff claimed that the walls had not been relaid, and that the action of the frost from year to year had gradually crowded them together, until they were in some places but three inches apart. It was clearly competent for the plaintiff to support his evidence as to the situation of the stones at the time of

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the accident, by showing a natural movement which would account for their being in the situation claimed. It was therefore proper to show by the witness Rood that he examined the sluice in 1892, and that the stones were then not more than six inches apart in some places; and by the witness Hislop that he examined the sluice five years before the accident, and the year after it, and several times between, and that he found the opening had contracted every time he looked from first to last.

In view of the relation which was claimed to exist between the previous condition of the sluice and the excavation which caused the accident, it was proper to show that the town had knowledge of this previous condition. It is true that notice is not necessary to make a town liable for an insufficiency which exists through its fault; but in this case it was clearly permissible to prove notice, to show that the town was in fault. This made admissible the testimony of O. K. Brown, that while acting as first selectman, about a year before the accident, he was told that the sluice was not sufficient to carry off the water in the spring. The possession of this knowledge would bear upon any claim that the injury to the covering of the sluice had occurred so recently that no liability attached. The town would be liable for a defect in the covering of the sluice, although too recent to have been known, if it was the natural and probable result of a previous condition as to which the town was in fault.

The plaintiff was also entitled to show that this contracted condition of the sluice had existed so long and produced such results that the town ought to have known of it, if it did not. To this end it was proper to show by Truman Mead, Jr., that he had seen the water run on top of the sluice several times at the spring season in different years prior to the accident.

The witness Rood, who built this sluice, testified without objection that if it had remained the size it was built it

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would have been sufficient to carry off the water; and as above held, was properly permitted to testify that he examined it in 1892 and found the space narrowed in some places to six inches; and also testified without objection that he had noticed the water that had accumulated there, and that there was enough to float a boat most any time in the spring or fall—two or three feet deep. He was then asked under exception whether the sluice as it was when he examined it in 1892 was sufficient to carry off the water that accumulated there at any time, and replied that it was not more than half big enough. It is claimed that this inquiry was objectionable in that it called for the opinion of the witness upon a question of sufficiency. The question was fairly limited by its connection to the seasons of accumulation respecting which the witness had testified, and his testimony was in terms sufficiently general to cover all the years during which the trouble had existed. In view of this it may perhaps fairly be claimed that the question did not call for an opinion, but for a statement in another form of a fact to which the witness had already testified. However this may be, we think the answer as given was really no more than a statement that the sluice did not carry off half the water, and could have conveyed to the jury no impression beyond that given by his previous testimony received without objection. Harm cannot be predicated of an opinion which goes no further than what the witness has just presented of his own knowledge in the nature of actual demonstration.

Defendant claimed that Truman E. Mead dug the trench which caused the accident, and threw the dirt beside it. Mead testified that he found the gully there and the water running through it, and got out a few shovelfuls of earth at one end with the idea of lowering the channel and letting off the water, but that the difficulties were such that he abandoned the attempt. The witness Brown was particularly inquired of on cross examination as to the amount of this

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dirt, with the evident purpose of claiming that the pile was sufficient to account for the excavation. The witness was then permitted to state on re-direct how far the dirt would go towards filling the gully. This fact was proper to meet the purpose of the cross examination, and the manner of proving it was not in violation of the rule respecting opinion evidence. In the absence of proof of measurements of the pile and the excavation, no description of the two could enable the jury to determine whether the dirt was sufficient to fill the hole, and the judgment of the witness might properly be taken.

The jury having viewed the sluice as it was in April, 1895, and the witness Brown having seen it both at that time and in the spring of 1893, just after the accident, it was not error to permit him to state that its condition in April, 1895, was about the same as its condition at the time of the accident. It was proper to supplement the examination of the jury with direct evidence of the fact that the condition of the sluice remained unchanged. It was not necessary that the jury be left to determine the fact solely by comparing what they had seen with the description given of its previous condition. It is impracticable, and often impossible, to describe conditions so accurately and minutely as to negative the occurrence of a change with the same force that attaches to the statement of the observer.

The defendant claimed and introduced evidence tending to show that a year previous to the trial, and until shortly before the jury saw the sluice, its walls were regular and straight, and at least twelve inches apart at the narrowest point; and that they had been tampered with by some one not long before the jury was taken there. To meet this evidence, the witnesses Clark and Mason were permitted to give in detail the results of an examination of the sluice made during the trial. The evidence was objected to as not proper rebuttal; and it is now urged in support of the objection that their testimony should have been confined to

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a statement that they had examined the sluice enough to determine whether it had been tampered with, and found that it had not. But we think the testimony might properly embrace such details as would be likely to satisfy the jury that the witnesses were not mistaken in regard to the main fact. The fact that such details would have been pertinent and important in the opening did not require their exclusion in rebuttal. We have not been furnished a copy of this testimony, and must dispose of the matter upon what is shown by the exceptions. It appears that the witnesses, after stating that they removed the dirt which covered the slabs and then took up the slabs, were permitted to describe the manner in which the stones of the side-walls were embedded in the earth, and to give a large number of measurements of the space between the side-walls, showing the irregular position of the stones. This clearly tended to disprove a part or all of the testimony of the defendant above stated. We cannot say that the details were more than might properly be received to give force to the testimony.

The defendant having introduced witnesses who testified that they saw the deceased as he was driving towards the place of the accident and that he was driving fast, it was not error to permit the plaintiff to show by Miss Butterfield, who lived at a point nearer the place of the accident and saw deceased as he was passing her house, that he was then driving slow.

We have not been furnished with the testimony of Friott referred to in the exceptions, and nothing is disclosed by the exceptions themselves that enables us to pass upon the propriety of the testimony received in rebuttal of his statements.

The motion to direct a verdict for the defendant was properly overruled. The first ground alleged erroneously assumes that the plaintiff could not recover without showing that the town knew of the existence of the gully,

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or showing that it had existed so long that the town ought to have known of it and repaired it. The case presented was not that of an unforeseen defect arising without fault of the town. The plaintiff's evidence tended to show that the insufficiency in the covering of the sluice was the direct and natural result of a defect in the sluice of which the town had long had knowledge. This view disposes also of the second ground stated in the motion, as well as of the first request to charge relied upon in argument.

The claim that there was no affirmative proof that the deceased was in the exercise of ordinary care, was incorrect. The exceptions refer to the testimony of Truman E. Mead and Hattie Mead as bearing upon this point. The testimony of Hattie Mead has not been furnished us, but that of Truman E. Mead certainly disclosed circumstances which pointed to the exercise of proper care. The fact that the horse stopped with the hind wheels of the wagon but a few inches past the gully was evidence tending to show that the deceased was driving carefully.

The court properly refused to instruct the jury that if the highway commissioner went over the road four days before the accident, and saw no water running over the road and no sign of its having done so, the town was not negligent in failing to go over the road again before the time of the accident. Looking at the case with reference to the washout alone, it was for the jury to say whether the town should have known of the defect under the circumstances.

Truman Mead testified that on the Monday before the accident he told the highway commissioner that the sluice was frozen up and the water running over the road, and that he was going to be damaged by the water backing into his cellar. It was not error to refuse an instruction that this was not notice of any defect in the highway rendering it unsafe for travel. The town could not claim immunity on the ground that its knowledge did not extend to the actual cutting of the gully. This complaint, although made with

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reference to private damage, informed the authorities of a condition of things which might be expected to result in an unsafe culvert; and, having regard to the gully alone, the question of its diligence was to be considered with reference to this information.

The defendant requested an instruction that if the jury found the sluice was sufficient for carrying away such water as would naturally and ordinarily run to it, and that its sufficiency was only impaired by its freezing up in the winter, the town could not be held responsible for such freezing, nor liable for the happening of the accident, unless the town officers, as reasonably careful and prudent men, had reason to expect that as a result of such freezing the road would be rendered insufficient and unsafe, and unless it was so rendered insufficient and unsafe. This request is defective in at least one respect. It is not true that if the town had no reason to expect that the stoppage of the water would render the road unsafe, it could not be liable for the accident. If the stoppage of the water did produce an insufficiency of the culvert which rendered it unsafe, it was the duty of the town to learn of the defect and repair it within a reasonable time, even though it may not have had reasonable cause to expect such a result. The fact that it had no reasonable cause to expect such a result would have its bearing upon the question of diligence when the defect was developed, but would not relieve it from the duty of prudent supervision and reasonable promptitude, nor from liability for any lack in this respect.

Mrs. Truman Mead, the mother, and Mrs. Ella Mead, the wife of the intestate, were riding together in another vehicle behind the intestate as he approached the place of the accident. The wife was produced as a witness to the occurrences of the evening, but Mrs. Truman Mead was not, although she was accessible and able to appear. The court was asked to instruct the jury that, in view of all the testimony, it was fair to infer from the failure to call Mrs.

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Truman Mead that the testimony given by the plaintiff's other witnesses to matters concerning which Mrs. Truman Mead had knowledge, was untrue. The instruction was properly refused. The failure to call Mrs. Mead may have been a circumstance proper for the jury to consider, but if the defendant was entitled to any charge in regard to it, it certainly was not entitled to the charge asked. If it is ever fair to assume from the failure to produce one of two favorably disposed witnesses that the testimony given by the other is false, it must be in view of a variety of circumstances which it is the province of the jury to pass upon. A charge in the language of the request would have assumed that certain features of the testimony could be viewed only in one way.

Judgment affirmed.

TOWN OF BARRE *vs.* GEORGE JERRY.

January Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

A town recovering a forfeiture under R. L. 3132 (V. S. 3513) for wanton injury to a highway is entitled to full costs, although the penalty be less than five dollars.

R. L. 1444 (V. S. 1686) and R. L. 1445 (V. S. 1687) considered.

ACTION FOR PENALTY under R. L. 3132 (V. S. 3513). Plea, not guilty. Trial by jury at the March Term, 1895, Washington County, *Start*, J., presiding. Verdict, one dollar. Judgment thereon with full costs. The defendant excepted.

The action was commenced before a justice of the peace and came to the County Court on appeal by the plaintiff.

John G. Wing for the defendant.

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The plaintiff, having recovered only nominal damages can recover only five dollars of costs. R. L. 1444 and 1445 (V. S. 1686 and 1687) *Engrem* v. *Myers*, 54 Vt. 628.

It is only by force of the statute that costs are ever allowed. *Tyler* v. *Frost*, 48 Vt. 486; *Munger* v. *Verder*, 59 Vt. 386.

John W. Gordon and *George W. Wing* for the plaintiff.

This proceeding is of the nature of a criminal prosecution. The offense is against the public. The limitation upon costs applies only to civil actions.

MUNSON, J. This is an action founded on R. L. 3132, (V. S. 3513); which provides that one who wantonly or illegally injures a highway, in any of the ways therein specified, shall forfeit to the town, to be expended in repairing highways, not more than thirty dollars, to be recovered by the selectmen, in an action in the name of the town, with costs. The plaintiff obtained a verdict for one dollar, and the court allowed full costs. To this allowance the defendant excepted.

R. L. 1444 (V. S. 1686) restricts costs in actions tried before a justice to five dollars, when the amount recovered does not exceed that sum; and R. L. 1445, (V. S. 1687) provides that when the plaintiff appeals the county court shall be governed by the same rule. The plaintiff would have recovered the restricted costs allowed by this general provision, if nothing had been said about costs in R. L. 3132 (V. S. 3515); so no effect will be given to the words "with costs" contained in that section, unless they are held to carry full costs. The general provision was enacted as early as 1822, and the section last cited, the substance of which had been before enacted and repealed, dates from the revision of 1839. There is nothing to indicate that the allowance of costs by this section was intended as a mere repetition, and the rule which requires that some force be given to a further legislative expression must be applied.

Judgment affirmed.

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REUBEN V. DUNKLEE *vs.* NETTIE L. HOOPER.

May Term, 1896.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Conditional Deed—Waiver—Evidence.

The plaintiff conveyed the demanded premises to the defendant by a warranty deed conditioned for the plaintiff's support upon the premises during life, and both parties occupied under it. The title, therefore, vested in the defendant subject to be defeated by a breach of the condition and a claim of forfeiture.

Even if the defendant's conduct amounted to a breach of the condition, the plaintiff's voluntary return to the premises and acceptance of further support was a waiver of his right to claim a forfeiture.

A grantor who is receiving his support under a conditional deed is entitled to a reasonable time, according to the circumstances of the case, in which to take action with reference to a breach, and it is not every acceptance of service that will constitute a waiver as matter of law.

Evidence that the plaintiff had no place to which he could go if he left the defendant's, might have been admissible had it been limited to the time during which his removal was in contemplation, but, not being so limited, was erroneously received, and as it cannot be said to have been harmless the judgment must be reversed.

EJECTMENT. Plea, the general issue. Trial by jury at the December Term, 1895, Windsor County, *Rowell*, J., presiding. Verdict and judgment for the plaintiff for possession and damages. The defendant excepted.

April 1, 1891, the plaintiff conveyed the premises to the defendant by a deed of warranty in common form but subject to the condition that the defendant should support the plaintiff during his life in the manner provided.

Alvah Dunklee, a son of and witness for the plaintiff, having testified on cross examination that his father remained at the defendant's receiving support from October, 1893, to August, 1894, was allowed to state on re-examination that "there was no other place where his father could have got

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his daily food from October, 1893, until April 17th, 1895;" to which the defendant excepted.

L. M. Read and *W. W. Stickney* for the defendant.

The Alvah Dunklee evidence was inadmissible. Whether the plaintiff had or had not some other place to go to did not affect the legal rights or duties of the parties.

By remaining with the defendant and receiving his support from her the plaintiff waived his right of forfeiture if any existed, and no new cause arose near the time of his departure. *Norton's Adm'r* v. *Perkins*, 67 Vt. 212; *Hubbard* v. *Hubbard*, 97 Mass. 188.

Gilbert A. Davis, *W. E. Johnson* and *George L. Fletcher* for the plaintiff.

The Alvah Dunklee evidence was admissible as properly growing out of the cross examination.

MUNSON, J. The title to the demanded premises vested in the defendant upon the receipt of her deed from the plaintiff, subject to be defeated by a breach of the condition contained in the deed and a claim of forfeiture by the grantor. The plaintiff took up his residence on the premises as provided for in the deed on the sixth day of April, 1891, and received his support there from that date until the seventeenth day of April, 1895, except during eleven weeks in the summer of 1893. He left the premises on the day last named, and immediately brought this suit.

We do not deem it necessary to consider the circumstances connected with the plaintiff's absence from the place in 1893. He returned to the premises and received his support there for a year and a half after this. There was no evidence tending to establish any fact that could relieve him from the consequences which the law attaches to this course of action. His voluntary return to the premises and acceptance of further support was a waiver of his right to claim a forfeiture for any breach which existed prior to his departure.

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But there was evidence tending to show a failure to provide properly for the plaintiff during the winter of 1894–5. The plaintiff's brief refers to the breaches relied upon as having occurred shortly before he left. The defendant claims that there was no evidence tending to show a breach immediately preceding the departure, and that the plaintiff's acceptance of support until then, without giving notice of his purpose to claim a forfeiture, was necessarily a waiver of the prior breaches. But our view of the law applicable to the case is such that it is unnecessary to inquire whether the evidence brings the defendant's default down to the very day of the plaintiff's removal. It is true as a general proposition that an acceptance of further performance of a condition will defeat the grantor's right to claim a forfeiture for a known prior breach. It may be that when the condition provides only for the payment of money at stated intervals, or the doing of certain specific acts, the question of waiver can be disposed of as one of law. But the situation is different, when the condition covers the continuous care and infinite variety of service which constitute the support of one as a member of the family. We think that in cases of the latter class it cannot be said as matter of law that every acceptance of further service without notice is a waiver. A grantor who is receiving his support under a conditional deed is entitled to a reasonable time to take action with reference to a breach, and what might be an unreasonable time in the case of one person might be entirely reasonable in the case of another.

This view might have disposed of the question raised as to the admissibility of evidence that the plaintiff had no place to which he could go if he left the defendant's, if it had been confined to the time during which his removal was in contemplation. But we think evidence of this character covering the entire period from his return in 1893 to his final departure in 1895 was inadmissible. It is clear that the plaintiff could not take his support for a year and a half,

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and then say that his remaining did not amount to a waiver because he had no place to which he could go. It is only when this fact is brought into connection with other conditions that it becomes material. It was not admissible with reference to a time when the plaintiff had no thought of leaving, and was making no effort to find a place to go to. There was no evidence tending to show that the plaintiff contemplated leaving, or that anything looking to a removal was being done by him or any one in his behalf, until a few weeks before he left.

It may be suggested that if this evidence was admissible as to the last few weeks, its admission as to the whole period must have been harmless. But this is a case in which it is more than ordinarily difficult to feel sure that testimony of this character had no prejudicial effect. This evidence covered a long period regarding which accounts of the defendant's ill-treatment of the plaintiff were before the jury, and it was in substance that the plaintiff had no other place where he could have got his daily food unless he was taken by the town. The question is not whether this ought to have prejudiced the jury, but whether it may have done so. But we think it is quite probable from the manner in which the evidence was offered and received that it was prejudicial. The evidence was first introduced with reference to a period extending from the plaintiff's return in 1893 to August, 1894; and was offered, as shown by the frame of the question, to meet a statement of the witness previously made in cross-examination, that the plaintiff remained at the defendant's during that time receiving his support; and was admitted by the court as bearing upon the question of waiver. It does not appear how the case was finally submitted, for no exceptions were taken to the charge.

It is not necessary to pass upon the exception allowed to the answer which the court had said should not be taken.

Judgment reversed and cause remanded.

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NATHAN T. SPRAGUE *vs.* WILLIAM C. FLETCHER.

May Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, and START, JJ.

Taxes—Distraint of Bank Stock—No. 17, Acts of 1892, Unconstitutional.

The defendant, as tax collector, distrained and sold the plaintiff's bank stock upon an illegal tax, making regular return of his doings, and the plaintiff bid it in and paid for it. No transfer was made upon the books of the bank because the shares already stood in the plaintiff's name. *Held*, that the invasion of the plaintiff's right was complete.

No. 17, Acts of 1892, denies to non-residents of Vermont rights which are allowed to residents, under the same circumstances, in respect to deductions from taxable personal property by reason of debts owed by the tax-payer, and therein conflicts with Art. 4, § 2, of the Federal Constitution, securing to citizens of each state "all the privileges and immunities of citizens in the several states."

It was the plaintiff's duty in claiming deductions for debts, to furnish by his inventory information which would enable the listers to determine whether he was entitled thereto. But having fulfilled this duty to the extent of showing that such indebtedness exceeded his entire personal estate, his right could not be prejudiced by the fact that he insufficiently designated certain other debts, nor by his returning property as taxable which he might have returned as exempt.

TROVER AND CASE for the sale by the defendant, as tax collector, of the plaintiff's bank stock to satisfy taxes alleged to be illegal. Trial by jury at the March Term, 1895, Rutland County, *Thompson*, J., presiding. Verdict for the plaintiff directed, and judgment thereon. The defendant excepted.

Stewart & Wilds and *J. C. Baker* for the defendant.

The legislature was justified in discriminating against non-residents in respect to the right to deduct debts owing, because of the inability of this State to reach that portion of the personal estate of non-residents situate without the State, and because of the inability of listers to verify the

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statements of tax payers touching matters outside the State. The presumption is that all such equities are adjusted in the place of the tax payer's domicile. *People* v. *Barker*, 147 N. Y. 39; *People* v. *Commissioners of Taxes*, 23 N. Y. 224.

The plaintiff was not entitled to deduction for debts owing, because he failed to answer truly interrogatory 19 in his inventory.

The levy upon and sale of the plaintiff's bank stock was no invasion of his legal rights. There was no transfer of the stock. Indeed this would have been futile, for the purchaser was already the owner; but this shows that the legal infraction of the plaintiff's rights was not fully matured. If the levy and sale were void it conferred no title, and the plaintiff's remedy was an action for breach of the implied warranty of title.

C. A. Prouty for the plaintiff.

It has once been determined in this case that the plaintiff has a cause of action upon the facts proved. *Sprague* v. *Fletcher*, 67 Vt. 46.

The listers, in disallowing the plaintiff's offset, relied upon No. 17, Acts of 1892, which provides that no offset shall be allowed a non-resident doing business in Vermont, except in certain specified instances not applicable to the plaintiff. This statute manifestly discriminates between a resident and non-resident and is void, for that reason, under Art. 4, § 2, of the Federal Constitution. That section has uniformly been held to secure non-resident citizens from every kind of discrimination in the matter of taxation. *Ward* v. *Maryland*, 12 Wall. 418; *Wiley* v. *Parmer*, 14 Ala. 627; *Crandall* v. *State*, 10 Conn. 339: *Bliss' Petition*, 63 N. H. 135; *State* v. *Lancaster*, 63 N. H. 267; *Fecheimer* v. *Louisville*, 84 Ky. 306; *McGuire* v. *Parker*, 32 La. An. 832; *Davis* v. *Pierse*, 7 Minn. 13; *Oliver* v. *Washington Mills*, 11 Allen, 268, 280; Cooley, Taxation, 99; *Railroad Tax Cases*, 13 Fed. Rep. 722, 736; *Exchange Bank* v. *Hines*, 3 Ohio St. 1; *People* v.

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Weaver, 100 U. S. 539; *Supervisors* v. *Stanley*, 105 U. S. 305, 316.

START, J. The evidence tended to show, that the defendant had authority to collect several taxes that were assessed against the plaintiff on the grand list of the town of Brandon for the year 1893; that he duly distrained, posted and sold the bank stock declared for, in accordance with the requirements of No. 11 of the Acts of 1882; that the plaintiff purchased the same at the official sale thereof and paid therefor; that the defendant made due return of his proceedings, and delivered duly attested copies thereof to the clerk and cashier of the bank issuing the stock; and that no transfer of the stock was made upon the books of the bank and no certificate of transfer issued. At the close of the evidence, the defendant insisted that an invasion, by the defendant, of the plaintiff's right in the stock had not been shown and, upon this ground, moved for a verdict. This motion was denied, and the defendant excepted. The defendant now insists that the motion should have been granted, because the stock was not transferred upon the books of the bank and a certificate of transfer issued to the plaintiff. We think this motion was properly denied.

When the defendant delivered copies of his tax warrants, with his return thereon duly attested, in accordance with the requirements of No. 11 of the Acts of 1882, it became the duty of the proper officers of the bank to transfer the stock upon the books of the bank and issue a certificate of transfer thereof to the purchaser named in the defendant's return. This was not done, because the stock then stood in the name of the purchaser upon the books of the bank. There was no occasion for such transfer and issue of a certificate. The defendant's return showed that the plaintiff became the purchaser at the official sale of the stock, and his title was perfect without such transfer and certificate. The defendant could not transfer the stock upon the books of the bank or issue a certificate of transfer

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thereof. When he had distrained it, posted it for sale at public auction, offered it for sale to the highest bidder, sold it to the plaintiff because he was such bidder and paid therefor, and made return of his doings as the law requires, he had invaded the plaintiff's right in the stock, and done all he could to divest the plaintiff of all title to it, except the title acquired by its purchase from him. He had compelled the plaintiff to become the purchaser thereof or submit to having his stock sold to a stranger, transferred upon the books of the bank and a certificate of transfer thereof issued, which would place it beyond his reach or control for a time, if not permanently, or to institute legal proceedings to prevent such sale and transfer thereof. The plaintiff has paid the defendant for the stock. He has done this, not as a volunteer, but because the defendant, in his official capacity, by invoking the aid of the law, has compelled him to do so, or stay the hand of the defendant by resort to equity for an injunction, or suffer his stock to pass out of his control to an extent that would for a time, at least, deprive him of dividends thereon and preclude him from voting and participating in the business and management of the affairs of the bank to the extent that he otherwise would; and we think this was such an invasion of the plaintiff's right in the stock as was held actionable when this case was before us on demurrer to the declaration. *Sprague* v. *Fletcher*, 67 Vt. 46.

The plaintiff, whose domicile was in Brooklyn, New York, as the jury have found, claimed to be domiciled in Brandon, Vermont, and duly returned to the listers of Brandon an inventory of his personal estate, and therein claimed a deduction for specified debts that he was owing, to the full amount of the appraised value of his personal estate. The listers treated him as a non-resident and, in accordance with the provisions of No. 17 of the Acts of 1892, refused to make the deduction to the extent claimed, and placed his personal estate in the list at sixty-five thousand six hundred and forty dollars; and this sum entered into the list on

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which the taxes in question were assessed. The court below held that this statute was unconstitutional and ordered a verdict for the plaintiff, to which the defendant excepted.

Section 12 of No. 2 of the Acts of 1882, provides that listers, in making up the lists of the several tax-payers, shall deduct from the appraised value of personal estate a sum equal to the excess, if any, of debts owing by such tax-payer over the aggregate amount of his United States bonds and other stocks and bonds exempt from taxation by the laws of this State, and the amount of his deposits in all the savings banks, savings institutions and trust companies in this State or elsewhere, and shall take one per cent. of the balance as the list of the personal estate of such tax-payer. This statute is general and was applicable to lists of non-resident as well as resident tax-payers, until the act under which the listers proceeded was passed; and it would have been the duty of the listers to have proceeded under it, in making up the plaintiff's list, but for the later statute, which was enacted after the statute above cited had been in force some ten years, and provides that no deduction shall be made for debts owing by a corporation or person residing without this State and doing business within this State, except such as were contracted by reason of business done within this State, and which are in excess of cash on hand within and without this State, and sums due without this State by reason of business done within this State. Had the listers, in making up the plaintiff's list, proceeded under the statute first enacted and made the deductions thereby authorized, no sum for personal estate would have remained for taxation; and the plaintiff would have been exempt from taxation to that extent.

This statute remains in force, and, under it, a resident of this State is entitled to a deduction from the appraised value of his personal estate equal to all debts owing by him in excess of the value of his non-taxable bonds, stocks and

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deposits; and, if these debts equal or exceed the appraised value of his personal estate, his personal estate is exempt from taxation. Under the later statute, this right, which had been for ten years extended to non-residents doing business in this State, is taken away; and the right remains only to a resident of this State. A non-resident doing business in this State is allowed a deduction from the appraised value of his personal estate for only such debts as were contracted by reason of business done in this State, and these are diminished by sums due to him without this State by reason of business done in this State, and cash on hand within and without this State that may be the proceeds and accumulations of business done entirely without this State. This statute provides only for lists of non-residents, and, because the plaintiff was a non-resident, the listers proceeded under it and denied the claimed deductions in making his list, and, in so doing, denied to him an immunity from taxation that is given to our own citizens. If the listers had made the deduction from the valuation of the plaintiff's personal estate that is allowed to residents, they would have exempted the plaintiff's entire personal estate from taxation. By proceeding under the statute relating to non-residents, the listers have assessed the plaintiff for property valued at sixty-five thousand six hundred and forty dollars that they would have exempted from taxation if the plaintiff had been a resident of this State. The effect of the statute is to exempt from taxation all the personal estate of a resident of this State, except the excess in value of such estate over debts owing in excess of non-taxable bonds, stocks and deposits, and to tax a non-resident's property, circumstanced the same, except that the owner resides out of the State; and, in so far as it does this, it provides an immunity from taxation to a resident that it denies to a non-resident, discriminates in favor of a resident and against a non-resident, and denies to citizens of other states an immunity given to our own citizens. Such

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discrimination and denial is clearly forbidden by the constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Art. 4, § 2, U. S. Constitution.

When a non-resident observes laws that are enacted with a view to regulate the conduct and action of our citizens, it is his right and privilege to have his property, situate in this State, protected under our laws as effectually as the property of a resident; and, if his property is subject to taxation, burdens and diminutions that a resident's property, circumstanced the same, is exempt from, his property is not thus protected, and he is denied an immunity under our law that is given to our own citizens. A non-resident cannot be taxed higher for personal property, situate in this State, than a resident owning like property under like circumstances, nor can he be compelled to pay taxes on such property, if like property, circumstanced the same, is exempt from taxation in the hands of a resident. A non-resident conforming to our statute relating to taxation is entitled to deductions from the appraised value of his personal estate, situate in this State, for debts owing, as favorable as those given to a resident; and he is entitled to a mode of classification and of determination as to what sum his property shall be placed in the list at, for the purpose of taxation, that does not subject him to taxation, when he would be exempt therefrom if he were a resident of this State, owning like property.

Under our system of taxation, when a non-resident's property is placed in the grand list, it is there for all purposes of taxation that the resident's property is subject to when placed in the list, and to the same extent. The list is increased by denying deductions and exemptions and diminished by allowing them. The only opportunity to discriminate is in making up the list, as the rate of taxation, or percentage of the grand list, for residents and non-residents is

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the same; therefore, discrimination should be avoided in the method of making up the list for taxation. A mode of making up the grand list of a non-resident, or a system of classifying, that results in placing his property in the grand list when a resident's property, under like circumstances is not, or is placed at a lower valuation by reason of a deduction from its appraised value that is not allowed to a non-resident, subjects the non-resident to a greater rate of taxation, and to the payment of taxes that are not exacted of a resident.

In *People* v. *Weaver*, 100 U. S. 539, it is held that a statute of New York, which permits a debtor to deduct the amount of his debts from the valuation of all his property, including moneyed capital, except his bank shares, taxes those shares at a greater rate than other moneyed capital, and is therefore in conflict with so much of the National Banking Act as provides that taxation on shares of national banks shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals, and void as to the shares of national banks. Mr. Justice Miller, in delivering the opinion of the court, said: "It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the state court, that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can have no such deductions. Nor can it be denied that, inasmuch as nearly all the banks in that state and in all others are national banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank

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shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The section to be construed begins by declaring that these shares may be 'included in the valuation of the personal property of the owner, in assessing taxes imposed by authority of the state within which the association is located.' This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than the *rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment, and a *valuation;* and, taking all of these together, the taxation on these shares was not to be greater than on all other moneyed capital. We are, therefore, of the opinion that the statute of New York, as construed by the Court of Appeals, in refusing to the plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress."

By our statute, the method of ascertaining at what sum, if any, the personal estate of a non-resident shall be placed in the list for general taxation is so radically different from the method of ascertaining like facts for the purposes of a resident's list that it subjects the non-resident, doing business in this State and having personal estate situate in this State and owing debts not contracted by reason of business done in this State, to taxation that he would be exempt from as a resident of this State, or to a higher rate of taxation. By making the plaintiff's list under the statute in question instead of the statute relating to lists of residents,

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he was denied an immunity from taxation given to our own citizens—an immunity that he claimed and, by his inventory, placed himself in a position to be heard in respect to and insist upon. The legislature may have power to provide a method for making up the grand list of a non-resident that differs from the method of making up the list of a resident, and to classify property for the purposes of taxation, if the purpose of the different method and classification is to secure uniformity of taxation and they have a tendency to secure it; but it has not the power to deny to a non-resident a deduction which is allowed a resident, that has the effect to place his property in the list for taxation and exempt like property of a resident, circumstanced the same, except that it is owned by a resident. Such legislation denies to citizens of other states privileges and immunities of citizens of this State. We do not give to the words, "privileges and immunities," the effect and meaning intended by the framers of the constitution, nor the meaning they fairly import, unless we give to the citizens of all the states the same benefits and advantages of acquiring and holding property and having the same protected as we give our own citizens. If we subject their property to taxation and burdens from which the property of our citizens is exempt, we discriminate against them in a manner forbidden by the Federal Constitution.

In *Ward* v. *Maryland*, 12 Wall. 418, the state imposed a higher license tax upon a non-resident than upon a resident for the privilege of selling goods by sample, and it was held that the act was void under the 2nd section of the 4th article of the Federal Constitution. Mr. Justice Clifford, in speaking of "privileges and immunities," says: "Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakenly secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business,

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without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and, inasmuch as the constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, it follows that the defendant might lawfully sell, or offer, or expose for sale within the district, described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each state possesses the power in laying taxes for the support of its own government to discriminate against the citizens of every other state of the Union."

In *Wiley* v. *Parmer*, 14 Ala. 627, it is held that the statute of the state, taxing the slaves of a non-resident at double the amount at which those of a resident were taxed, was unconstitutional.

In *Bliss' Petition*, 63 N. H. 135, it is held that a state cannot refuse a peddler's license to a citizen of another state, asked for upon the same terms that it grants licenses to its own citizens. The court said: "The state power of taxation cannot discriminate against the citizens of other states. The equality of privileges and immunities guaranteed by the federal constitution to the citizens of each state exempts them from any higher taxes than the state imposes upon her own citizens."

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In *State* v. *Lancaster*, 63 N. H. 267, it is held that an act requiring non-residents to procure a license for the sale of trees and shrubs which residents of the state are permitted to sell without license, is in contravention of the federal constitution.

In *McGuire* v. *Parker*, 32 La. Ann. 832, it is held that a state law, requiring the payment of twenty-five dollars per month by every non-resident selling goods by sample as a traveling salesman, is unconstitutional.

In *Oliver* v. *Washington Mills*, 11 Allen, 280, it is held that a tax upon the shares of non-resident and not upon those of resident stockholders in domestic corporations is void as a discrimination against the citizens of another state. In the course of the opinion, the court said: "We are unable to see how it can be supported consistently with that provision of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of citizens of the several states. * * * * It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy immunity of which the latter would be deprived. Such has been the judicial interpretation of this clause of the constitution by courts of justice in which the question has arisen."

In *Town of Farmington* v. *Downing*, decided by the Supreme Court of New Hampshire in 1893, reported in the 30th Atl. Rep. 345, the plaintiff assessed a tax on fifty shares of the capital stock of the Farmington National Bank, located in the plaintiff town. The defendant was a resident of Massachusetts and claimed that the shares were not liable to taxation because of his indebtedness. The court, in delivering the opinion, said: "For taxable

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purposes, Downing's national bank stock is to be treated as money on hand or at interest, and, if he had been a resident of this state, the excess only of the value of the stock over his interest bearing indebtedness would have been taxable, and as the value of the stock did not exceed the amount of his indebtedness it would not have been taxable. The taxable value of the shares is not determined by the residence of the owner. If the stock was not taxable to Downing as a citizen of New Hampshire, it was not taxable to him as a citizen of Massachusetts. The imposition of a higher tax upon him as a citizen of Massachusetts than he would be obliged to pay as a citizen of this state would be in conflict with the provision of the Federal Constitution, that the citizens of each state shall be entitled to the privileges and immunities of citizens of the several states."

In *People ex rel. Thurber, Whyland Company* v. *Barker*, 141 N. Y. 118, relied upon by the defendant, it is held that the New York statute does not authorize a deduction of debts from sums invested in business in that state by non-residents. In this holding, the court only gave a construction to the New York statute, and did not consider or decide whether the statute denied to a non-resident an immunity guaranteed by the Federal Constitution; therefore, the case is not an authority upon the question we have under consideration. The New York statute only provides that sums invested by non-residents in business shall be taxed, while our statute subjects all property of a non-resident, situate in this State, to taxation to the same extent that a resident's property is taxed, and denies a deduction to a non-resident that is given to a resident.

The plaintiff claimed to be a resident of this State and sought to place himself, for the purposes of taxation, upon the same ground that a resident is placed. By his inventory, he returned his property for taxation to the same extent he would have been required to do had he been a resident of this State. He returned his chattels, cash on hand, notes,

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mortgages, leases, sums due to him from parties residing within and without this State, taxable and non-taxable bonds, stocks, etc. He answered all interrogatories in the inventory and complied with all laws respecting taxation that are applicable to residents, and insisted upon the same immunity from taxation that our statute gives to them. It was his right to have the indebtedness set forth in his inventory considered by the listers; and, if found *bona fide*, and that he had complied with the law that a resident must comply with to be entitled to a deduction for debts owing, he was entitled to have the excess of such indebtedness over his non-taxable bonds, stocks and deposits deducted from the appraised value of his personal estate. Had this been done, no sum for personal estate would have remained for taxation, and his personal estate, situate in this State, would have been exempt from taxation. This right was denied him. The listers refused to consider his indebtedness and denied this exemption from taxation because he was a non-resident, and, in so doing, denied to him an immunity from taxation that is given by our statute to residents of this State. This was the denial of a right guaranteed by the Federal Constitution, and, because of this denial, the assessments against him must be held for naught.

The defendant insists that the listers properly refused the deduction claimed for debts owing, because the plaintiff did not give sufficient information as to the residence of the parties to whom he was indebted, and because he gave his stock in the Sprague National Bank in answer to Int. 14, when he should have given it in answer to Int. 19. It was clearly the duty of the plaintiff, if he claimed deductions for debts owing, to furnish, by his inventory, such information as would enable the listers to determine whether he was entitled to such deductions; and we think he has done so. He gave the residence of persons to whom he was indebted with sufficient definiteness, and the amount owing to each to an amount exceeding the value of his taxable and non-

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taxable personal estate. This information, if the indebtedness was *bona fide*, was sufficient to enable the listers to determine that his indebtedness exceeded his entire personal estate by many thousand dollars; and the fact that he named other persons to whom he was indebted, without giving the places of their residence, did not justify the listers in refusing to consider his indebtedness to parties whose residence was given. Int. 19 of the inventory was as follows: "What amount of stocks and bonds, claimed to be exempt from taxation under the laws of this State, was owned or held by you on the first day of April, 1893?" To this interrogatory, the plaintiff answered "None." Int. 14 was as follows: "What stock in banks, trust companies and other corporations in this State (except what is exempt in manufacturing and railroad corporations in this State) was owned or held by you on the first day of April, 1893?" In answer to this interrogatory, the plaintiff gave in his stock in the Sprague National Bank as taxable property, instead of claiming it as exempt in answer to Int. 19, as he might have done if the bank issuing the stock was located without this State; but no one was wronged by this. The listers had no reason to complain, and they did not. They did not deny a deduction because the inventory was not full and complete, but because they adjudged that the plaintiff was a non-resident. They knew from the inventory that the plaintiff had this stock. It will be noticed that Int. 19 called upon the plaintiff to state what amount of stocks he *claimed to be exempt from taxation under the laws of this State.* He was under no duty to *claim* that his bank stock was exempt, when he had returned it as taxable property in answer to Int. 14. It does not appear from the inventory where the bank in which he owned stock was located. If it was located in this State, it was his duty to return it as taxable property in answer to Int. 14. As the plaintiff was circumstanced in respect to assets and liabilities, it could make no difference whether his bank stock was deducted

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from his indebtedness or his indebtedness deducted from his bank stock, as by either method, no sum for personal estate would remain for taxation.

The defendant requested the court to instruct the jury that the plaintiff was not entitled to any deduction as claimed by him, if he wilfully misrepresented and underestimated the value of the Sprague National Bank stock in his inventory. This request was properly denied, unless the plaintiff placed a value upon this stock in his inventory and the evidence tended to show that he wilfully misrepresented and undervalued his stock. It does not appear from the defendant's exceptions, nor from the plaintiff's inventory, that the plaintiff placed any value upon his stock. It appears that some figures were placed opposite the shares of stock and erased, but by whom they were placed there or when erased, whether before or after the delivery of the inventory, does not appear. It does not appear from the defendant's exceptions, or from any evidence to which our attention has been called, that the evidence tended to show that the plaintiff wilfully made any misrepresentations respecting the value of his stock, by his inventory or otherwise.

The defendant claims, that, if the tax on the personal estate is invalid, the judgment should be reversed, and that the plaintiff should have relief only in respect to taxes assessed upon his personal estate, as deductions for debts owing do not extend to real estate. In respect to this claim, it is sufficient to say, that it does not appear from the defendant's exceptions that any of the taxes in question were assessed upon the plaintiff's real estate.

Judgment affirmed.

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STATE *vs.* WILLIAM McCAFFREY.

May Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Truancy Law—Complaint—Constitutionality—Negativing Exception.

A complaint drawn in accordance with V. S. 720 sufficiently appraises the respondent of the "cause and nature of his accusation."

The words, "beginning with the school year," as employed in V. S. 711, mean the beginning of the first term of school.

V. S. 711 requires attendance for twenty-six weeks beginning with the commencement of the first term and continuous thereafter while school is in session; and the respondent became amenable when it was established that his child had failed to attend in such manner as would make twenty-six continuous weeks from that time. Therefore he was not entitled to show that he intended to send the child, subsequently, to another school enough to make out the twenty-six weeks.

The exceptions in V. S. 711, "unless the child is mentally or physically unable to attend, has already acquired the branches required by law to be taught in the public schools, or is otherwise being furnished with the same education," are not descriptive of the offense and so to be negatived by the State, but matters of excuse to be shown by the respondent.

COMPLAINT for violation of the statute against truancy. At the February Term, 1896, Orleans County, *Thompson*, J., presiding, the cause was first heard on demurrer to the complaint. Demurrer overruled; complaint adjudged sufficient; exceptions by respondent; exceptions ordered to lie. Thereupon, at the same term, the respondent pleaded not guilty. Trial by jury. Verdict, guilty, and judgment and sentence thereon.

At the close of the evidence the respondent moved the court to order a verdict of not guilty, for that under the statute no prosecution can be had till the end of the school year, and upon the ground that there was no evidence tending to show that the said Mark McCaffrey had not been elsewhere provided with the same education during the

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time that the State's evidence tended to show that he was absent from school. The motion was overruled and the respondent excepted. All the evidence was referred to.

The evidence of the State tended to show that during the school year beginning April 1, 1895, there was kept in the district where the respondent resided, a lawful, public school of three terms, one term of eight weeks, beginning May 6, 1895, one term of ten weeks beginning September 2, 1895, and one term of ten weeks beginning December 2, 1895; that the respondent had, at the beginning of said school year and from thence continuously to the commencement of this prosecution, in his charge and under his control, his minor son, Mark, who, at the commencement of this prosecution, and at the time of trial, was over eight and under fifteen years of age; that during said first term the respondent did not cause said Mark to attend said school continuously, but on several days permitted him to remain away therefrom; and that during said second term said Mark attended the same only thirty-nine and one-half days, and that the first day he was absent from said term, complaint was made in respect to such absence, and this prosecution was commenced; that said Mark, during all the time said three terms were in session, was mentally and physically able to attend school continuously, beginning with the first day of the school year and the first day of said first term, and that during all that time he had not acquired the branches required by law to be taught in the public schools; and that during the time he was absent he was not otherwise being furnished with the same education as was being furnished by said public school, or any education, and had not attended a public school, twenty-six weeks continuously, in that school year prior to the commencement of this prosecution.

The respondent offered to show that "when he kept his son out of school, he intended to send him, subsequently, to the Craftsbury Academy for a time and in a manner which

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would make twenty-six continuous school weeks, together with what he had attended continuously at the district school, and that he did subsequently send his child to the Craftsbury Academy, and that the child is now attending school there." This offer was excluded and the respondent excepted.

It was conceded that Craftsbury Academy was a school fully equal to that which the State claimed the respondent should have caused his son to attend.

The respondent excepted to the failure of the court to charge that there was no proof but that the child was otherwise furnished with the education required.

H. F. Graham and *Cook & Redmond* for the respondent.

The demurrer should have been sustained.

V. S. 720, which is said to authorize this form of a complaint is unconstitutional in that it deprives the respondent of his right to "demand the cause and nature of his accusation." Const. Vt. Art. 10.

V. S. 711, which is the only section claimed to have been violated, is penal and demands a strict construction. "Only those transactions are covered by it which are within both its spirit and its letter." Bishop Stat. Cr. §§ 194, 230; *State* v. *McOmber*, 6 Vt. 215; *State* v. *Sumner*, 10 Vt. 587; I Bl. Com. 88; IV Id. 193; Endl. Interp. St. §§ 329, 330.

V. S. 705 prescribes that the school year shall commence on the first day of April. V. S. 711 requires a child to be sent to school "beginning with the school year." But this school did not, and few schools do, begin on the first day of April. If the legislature did not mean exactly what it said —and it cannot have meant that—what did it mean? The statute is a penal one and no conjecturing should be permitted.

The State was bound to show, as a part of its own case, that Mark was not being furnished with equivalent education, for the exception is contained in the body of the enact-

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ing clause. *State* v. *Butler*, 17 Vt. 145; *State* v. *Barker*, 18 Vt. 195; *State* v. *Abbey*, 29 Vt. 60; *State* v. *Norton*, 45 Vt. 258.

The evidence did not tend to negative this exception.

O. S. Annis, State's Attorney, for the State.

The demurrer was properly overruled. The complaint conforms to V. S. 720 and sufficiently designates an offense under V. S. 711. The truancy statute is a police regulation and in providing for its enforcement the legislature was tied up to common law methods of procedure. *State* v. *Hodgson*, 66 Vt. 134; I Bish. Crim. Proc. § 400; *State* v. *Camley*, 67 Vt. 322.

"The beginning of the school year," means the beginning of the first school term in the year.

Whether there was evidence to show that the child was not being furnished with equivalent education is immaterial. That was matter of defence. *State* v. *Abbey*, 29 Vt. 60; *State* v. *Hodgdon*, 41 Vt. 139.

TYLER, J. Section 711, V. S., makes it the duty of a person having the control of a child between the ages of eight and fifteen years to cause such child to attend a public school at least twenty-six weeks in a year, such attendance to begin with the school year and be continuous, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education.

(1) The respondent does not contend that the law is unconstitutional in respect to its compulsory requirement, but that the complaint does not appraise him of the "cause and nature of his accusation" in the manner provided by the constitution.

The complaint charges that the respondent had the control of his minor son, Mark McCaffrey, who was between the ages of eight and fifteen years, and neglected to

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send him to school as required by law. It is drawn in accordance with V. S., 720, which prescribes the form applicable to cases arising under §§ 711 and 719. See No. 13, Acts of 1870, and No. 22, Acts of 1892.

Section 711, which provides for compulsory attendance, is in the nature of a police regulation, and was enacted with a view to the safety and welfare of the State, the intelligence of the people being its safeguard.

Article 5 of our constitution provides: "That the people of this State, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." It was said in *State* v. *Hodgson*, 66 Vt. 134, "The constitution of the State, its provision for a legislature to enact laws, the committal to it of the exclusive right and power to govern and regulate the internal police of the State, as well as the statutes of the State, proceed upon the theory that the State has the right and power to change and vary at its pleasure, both in criminal and civil matters, the methods of procedure, so long as it does not invade the fundamental rights of the citizen reserved by the constitution. It does not, as some seem to think, tie up the legislature to follow common law methods of procedure, even in criminal cases." It was therefore competent for the legislature to prescribe the form of complaint, and it sufficiently exhibited to the respondent the nature and cause of the accusation.

(2) Section 705 prescribes that the school year shall commence on the first day of April. The clause in § 711, "beginning with the school year," was evidently employed to require that the twenty-six weeks' attendance should commence at the beginning of the first term and be continuous thereafter when school was in session. The reasons for the requirement are obvious—that children should begin their attendance when classes are being formed for the year, and that they should not interrupt the work of classes by unnecessary absences. The constitution declares that a competent

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number of schools ought to be maintained in each town for the convenient instruction of youth, and the statute requires that each district shall maintain a school at least twenty-eight weeks in the school year, and that all pupils shall be thoroughly instructed in certain branches of education. These requirements may be partially defeated and much of the expense of maintaining schools rendered useless unless regular attendance can be enforced.

The offer of the respondent to show that he intended subsequently to send his son to an Academy for a period of time which, with the time that he had attended the district school, would make twenty-six continuous weeks, was properly excluded. The offense was committed and the respondent became amenable to the statute whenever it was established that the child was not in attendance upon school in such a manner as would make twenty-six continuous weeks from the beginning of the first term in the school year. The State's evidence tended to show that prior to the filing of the complaint the child had been absent several days during the first term and had been in attendance only thirty-nine days of the second term of that school year. It was held in *Com.* v. *Roberts*, 159 Mass. 372, under a statute similar to ours, that it was incumbent upon the respondent, in order to escape the penalty imposed, to show that the child had been instructed for the specified time in the required branches of learning, unless the child had already acquired them.

(3) The respondent contends that to establish the offense it was incumbent upon the State to negative the exceptions in the statute. The rule is that the exceptions must be negatived only where they are descriptive of the offense or define it, but where they afford matter of excuse merely, and do not define nor qualify the offense created by the enacting clause, they are not required to be negatived. In this case the exceptions are not descriptive of the offense. If the respondent came within either of the exceptions the

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fact was peculiarly within his knowledge and should have been proved by him as matter of defense. The cases cited by the State and by the respondent support this rule.

Judgment that there was no error, and that the respondent take nothing by his exceptions.

CHRIS. CHRISTENSON *vs.* EDWIN CARLETON.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Arbitration—Waiver.

The evidence tended to show the following: A controversy was submitted to two arbitrators with power, if they should disagree, to appoint an umpire. The two heard the case and without attempting to decide it called in a third; whereupon a rehearing was had and an award made which was signed by all. *Held*, that if these were the facts, the award was invalid.

The defendant did not waive his right to object to the award by taking part in the rehearing if he, without fault, understood that the original arbitrators had tried to agree and failed. A waiver is an intentional abandonment of a known right.

DEBT on a written award. Plea, the general issue. Trial by jury at the March Term, Washington County, 1896, *Ross*, C. J., presiding. At the close of the testimony the court directed a verdict for the plaintiff for the amount of the award with interest and costs. The defendant excepted. The case is stated in the opinion.

W. E. Barney and *Frank J. Martin* for the defendant.

The two arbitrators were not authorized to appoint a third until they had failed in an honest effort to agree. *Royse's Admr.* v. *McCall*, 5 Bush (Ky.) 695; *Traverse* v. *Beall*, 2 Cranch, C. C. 113; *McMahan* v. *Spinning*, 51 Ind.

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187; *Daniel* v. *Daniel's Admr.* 6 Dana (Ky.) 98; *Sharp* v. *Lipsey,* 2 Bailey (S. C.) 113; Morse on Arb. and Award, 245; *Howard* v. *Edgell,* 17 Vt. 9.

There was no waiver by the defendant, for he did not know of the irregularity until after the award was made. *Boynton* v. *Braley,* 54 Vt. 92; *Hoxie* v. *Home Ins. Co.* 32 Conn. 40; *Lewis* v. *Phœnix Mut. Life Ins. Co.* 44 Conn. 72; *Kent* v. *Warner,* 12 Allen 563; *West* v. *Platt,* 127 Mass. 367; *Holdsworth* v. *Tucker,* 143 Mass. 369.

Moreover, whether the defendant had waived his right was a question for the jury. *Findeisen* v. *Metropole Ins. Co.,* 57 Vt. 520; *OKey* v. *State Ins. Co.,* 29 Mo. App. 105; *Fox* v. *Harding,* 7 Cush. 516; *Traynor* v. *Johnson,* 1 Head 51; *Farlow* v. *Ellis,* 15 Gray 229; *Smith* v. *Dennie,* 6 Pick. 262; *Kent* v. *Warner,* 12 Allen 563; *Coursin* v. *Penn. Ins. Co.* 46 Pa. St. 323; *Hale Mfg. Co.* v. *American Saw Co.* 43 Mich. 250.

H. W. Scott and *Richard A. Hoar* for the plaintiff.

The verdict was properly ordered. Awards are not set aside except for fraud or gross irregularity, and in this case everything was fair. *Soper* v. *Frank,* 47 Vt. 368.

The original arbitrators did not agree, therefore they "failed to agree," and were justified in appointing an umpire. At all events the defendant waived his right to object by taking part in the rehearing. *Blanchard* v. *Murray,* 15 Vt. 548; *Ranney* v. *Edwards,* 17 Conn. 309; *Van Cortlandt* v. *Underhill,* 17 Johns. 405.

The award is a judgment and cannot be collaterally impeached. *Woodrow* v. *O'Connor,* 28 Vt. 776.

Partiality, corruption and fraud, as grounds of defense to an award, are cognizable only in equity. *Emerson* v. *Udall,* 13 Vt. 477.

TAFT, J. This action is in debt upon a written award. The parties submitted a controversy as to a certain horse, and other disputes and claims, to the arbitrament and

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award of Allen Bates and John McLaughlin, and stipulated that in case said Bates and McLaughlin failed to agree they, Bates and McLaughlin, should have power to select another arbitrator, and the decision of the majority should be final.

The award was signed by Bates, McLaughlin and a third person by the name of Jackman.

Upon trial the testimony tended to show the following facts, viz: That before the cause was heard, the two arbitrators proposed that Mr. Jackman, or some third man, should be called in to act with them, but the defendant objected and said to them to try it themselves. They accordingly heard the case and considered it, they then agreed between themselves that there was a great deal more to the case than they had any idea there was when they consented to hear it, and Mr. Bates proposed to call in the third man, and they did so,—when the three heard the case and made the award. Both of the arbitrators testified; McLaughlin, that, after they had heard the testimony they did not try to agree upon the case, and Bates, that the arbitrators neither disagreed nor agreed, and did not really try to do so, giving as a reason that he thought there was no use in it, that the defendant was not present when the arbitrators agreed to call in the third man and that they did not notify him that they had failed to agree. The defendant testified that he supposed the arbitrators, when they called in Jackman, had failed to agree; that he did not suppose they would be bold enough to call in another man after he had so strenuously refused to have them do so, unless they had disagreed.

Under the terms of the submission the defendant was entitled to have Bates and McLaughlin exercise their judgment in respect to the controversies submitted to them; and they had no right to call in Jackman to act as arbitrator unless, after they had heard the parties and their witnesses, they failed to agree in respect to the matters submitted to them. Until they did exercise such judgment

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and fail to agree, they had no right to call in the services of a third arbitrator, and such proceeding and all subsequent ones were null.

It is insisted that the defendant waived that irregularity by proceeding with the arbitration. Had he known when Jackman was called in, that the arbitrators had not failed to agree and he had then proceeded with the arbitration, this claim might be tenable: but his testimony tended to show that he believed they had disagreed and was not aware that they had not disagreed until some days after the hearing. This was no waiver of the irregularity as he did not know what his rights were in that respect, supposing that they had disagreed. A waiver is an intentional abandonment of a known right.

These questions, whether the two arbitrators failed to agree, and whether the defendant voluntarily proceeded with the arbitration knowing that they had not failed to agree, are questions that should have been submitted to the jury. The court erred in not doing so and for that reason

The judgment is reversed and cause remanded.

EMMA TERRYBERRY *vs.* EDWARD D. WOODS.

October Term, 1896.

Payment—Burden of Proof.

The defendant, having pleaded payment and introduced a receipt purporting to be signed by the plaintiff, requested the court to charge that if the receipt was genuine it was *prima facie* evidence of payment and cast upon the plaintiff the burden of disproving it. *Held*, that the instruction was properly refused.

The burden of proving an allegation remains with the party making it. The weight of evidence may vary from side to side as the trial proceeds, but the burden of proof never shifts.

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ASSUMPSIT in the common counts. Pleas, the general issue, payment and offset. Trial by jury at the June Term, 1896, Bennington County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff sought to recover one thousand dollars and interest which she claimed the defendant had collected for her and failed to pay her on request. The verdict was for the full amount.

The defendant claimed that he had paid five hundred dollars on one occasion to the plaintiff herself and two hundred and fifty dollars on another occasion to the plaintiff's mother for the plaintiff, and introduced receipts for such payments purporting to be signed by the plaintiff and her mother respectively.

The plaintiff denied the payments and the giving of the receipts but did not deny the genuineness of the signatures.

The defendant requested the court to charge, First, "If the plaintiff signed the receipt for five hundred dollars, it is *prima facie* proof that she received the money from the defendant, and the burden of proof is on the plaintiff to show that the defendant did not pay the five hundred dollars as he claims," and, Second, "If the plaintiff's mother signed the receipt for two hundred and fifty dollars, the burden of proof is on the plaintiff to show that the defendant did not pay the money expressed therein to her."

The court declined to charge in accordance with either request, but told the jury that the burden was upon the defendant to prove the allegation of payment. No exception was taken to the charge as given.

Batchelder & Bates for the defendant.

The requests should have been complied with. A receipt is *prima facie* evidence of payment. While the burden of proving payment rested primarily on the defendant, the production of the receipt cast upon the plaintiff the burden of showing such facts as would destroy its effect. *Sparhawk* v. *Admr. of Buell*, 9 Vt. 41; *Burton* v. *Blin*, 23 Vt. 151;

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Stephens v. *Thompson*, 28 Vt. 77; *Hutchins et al* v. *Olcutt*, 4 Vt. 549; *Lamb* v. *Fairbanks*, 48 Vt. 519; I Green. Ev. (13 ed.) 363; *Guyette* v. *Bolton*, 46 Vt. 228; *Hildreth* v. *O'Brien*, 10 Allen 104.

F. S. Platt for the plaintiff.

A receipt not under seal may be contradicted or explained. *Ashley* v. *Hendee*, 56 Vt. 213; *Bennett* v. *Flanagan*, 54 Vt. 549.

The weight of evidence may vary, but the burden of proof does not shift. *Nichols* v. *Munsel*, 115 Mass. 567; I Green. Ev. § 74 and note; *Central Bridge Corp.* v. *Butler*, 2 Gray 132; *Powers* v. *Russell*, 13 Pick. 76.

Even if the requests were sound in law they were not applicable to the case. The question here was not what effect should be given to a genuine receipt but whether the receipt was ever executed. The question of the genuineness of the receipt and of the fact of payment were really one and the same.

TAFT, J. The burden of proving a fact alleged in a judicial proceeding is upon the person making the allegation, and this burden of proof, as it is called, never changes, but remains upon the alleging party throughout the trial. As the testimony upon the trial is introduced, the weight of the evidence may vary from side to side, but the burden of proof remains upon the one making the allegation.

The defendant pleaded payment, and by so doing assumed the burden of proving it.

The defendant was not entitled to binding instructions upon a portion of the evidence, applicable to a single question. The request was properly denied. The instructions, as given, are not in question.

Judgment affirmed.

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ARTHUR E. CAMPBELL *vs.* H. O. CAMP.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and THOMPSON, JJ.

General Issue in Replevin—No Demurrer to Notice.

Not guilty is, by statute, the proper general issue in replevin.
A notice filed with the general issue is not subject to demurrer. If insufficient, objection may be made to the evidence offered under it.

REPLEVIN. Plea, not guilty and notice of justification. Heard on general and special demurrer to the plea and notice, at the March Term, 1896, Washington County, *Start*, J., presiding. Demurrer overruled. The plaintiff excepted.

John W. Gordon for the plaintiff.

(1) The notice is insufficient because it says that the defendant "took said goods, if at all" etc. which is neither an avowry nor an admission of the taking. It is the general issue, not a justification.

(2) The notice is insufficient because it does not show a return of the warrant. *Wright* v. *Marvin*, 59 Vt. 437; *Ellis* v. *Cleveland*, 54 Vt. 437.

(3) Under the general issue the defendant cannot have a return of the goods. I Chitty 537.

(4) The defendant has the wrong general issue.

Richard A. Hoar for the defendant.

V. S. 1471 makes "not guilty" the proper general issue in replevin. *Plainfield* v. *Batchelder*, 44 Vt. 9; *Loop* v. *Williams*, 47 Vt. 407.

The notice is sufficient, as is held in the same cases.

ROWELL, J. This is replevin for seventy bottles of beer, alleged to have been taken by the defendant as deputy sheriff, from the plaintiff's store, on a warrant of search and

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seizure. Plea, not guilty, and notice of justification under said warrant. Both the plea and the notice are demurred to.

As to the demurrer to the plea, the statute provides that the general issue shall be joined on the plea of not guilty, and this court has held in cases just like this that such a plea is good. *Plainfield* v. *Batchelder*, 44 Vt. 9; *Loop* v. *Williams*, 47 Vt. 407.

As to the demurrer to the notice, it is sufficient to say that a notice is not the subject of demurrer. If insufficient, advantage must be taken of it by objecting to the testimony offered under it.

Judgment affirmed and cause remanded.

STATE *vs.* FRED BRUCE.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Complaint Insufficient.

A complaint which charges a breach of the peace by "threatening to strike, beat, injure and assault divers and sundry persons," without naming them or alleging that their names are unknown, is bad on general demurrer.

State v. *Coffin*, 64 Vt. 25, distinguished.

COMPLAINT for breach of the peace, before the City Court of Barre. Heard upon general demurrer, April 30, 1895. Demurrer overruled. The respondent excepted. The complaint is sufficiently recited in the opinion.

Richard A. Hoar for the defendant.

It is not sufficient to charge the offense in the language of

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the statute. The complaint must name the persons upon or against whom the acts were committed or threatened. *State* v. *Matthews*, 42 Vt. 542; *State* v. *Hanley*, 47 Vt. 290; *State* v. *Coffin*, 64 Vt. 25.

Zed S. Stanton, State's Attorney, for the State.

The complaint is sufficient. It charges a breach of the peace in one of the modes pointed out by the statute and sets forth the acts by which the offense was committed. R. L. 4228; *State* v. *Benedict*, 11 Vt. 236; *State* v. *Matthews*, 42 Vt. 542; *State* v. *Coffin*, 64 Vt. 25.

ROWELL, J. The complaint, which is demurred to, alleges that the prisoner, on such a day, disturbed the peace by "threatening to strike, beat, injure, and assault divers and sundry persons," etc., but does not name any of them nor allege that their names were unknown. It is fundamental in the law of criminal pleading that the name of the person injured, or against or upon whom the offense is committed, must be stated if known. The reason is, that thereby the offense is more certainly identified, and made more specific instead of being left general; the prisoner is better enabled to make his defense, and to plead his conviction or acquittal in bar of another prosecution for the same offense, and to avoid being put on trial for an offense not intended by the indictors. I Bishop New Crim. Proced. § 571; 2 Hawk. P. C. c. 25, s. 71; I Chit. Crim. Law [*213].

Lord Ellenborough says that the convenience of mankind demands, and that in furtherance of that convenience it is the duty of those who administer justice to require, that the charge should be specific, in order to give to the accused notice of what he is to come prepared to defend against. *Rex* v. *Perrott*, 2 M. & S. 379, 386. Suppose the prisoner at the bar to have been engaged in several like affrays on the day and at the place alleged, how is he to know which one this complaint charges him with?

In an information drawn by an eminent pleader a century

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ago, for riotously disturbing the peace by breaking into a warehouse where "divers and very many persons were assembled and met together," and there assaulting them, the names of some of the persons assembled are stated, and the names of the others are alleged to be unknown. So for riotously disturbing the peace by breaking into a house and assaulting a lodger, the name of the lodger is stated. II Chit. Crim. Law 502, 503.

State v. *Coffin*, 64 Vt. 25, relied upon by the State, is not in point. The acts there alleged as constituting a breach of the peace were not directed against any one in particular, but only against the public generally.

When the name of the person injured is not known, it must be so alleged, to show a reason for not stating it. And the allegation must be true in fact; for if false, it is improper, and will not avail. *Rex* v. *Walker*, 3 Camp. 264, and note; *Commonwealth* v. *Blood*, 4 Gray, 31, 33.

Whether the names of third persons otherwise connected with the offense must be stated, the cases do not agree. I Bishop New Crim. Proced. § 572. In *State* v. *Hover*, 58 Vt. 496, it was held necessary to state the name of the person of whom the prisoner solicited a risk for insurance as agent of a company not authorized to do business in the State.

Judgment reversed, demurrer sustained, complaint adjudged insufficient and cause remanded.

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MARY MANLEY, by next friend, *vs.* THE DELAWARE & HUDSON CANAL CO.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Conflict of Evidence—Contributory Negligence—Duty of Highway Traveler Approaching Railroad Crossing—Allegation and Proof—Impeachment of Witness.

If there is a conflict of testimony there is a question for the jury, though all of the defendant's evidence and most of the plaintiff's be to the same effect.

As the testimony stood the question of contributory negligence was properly submitted to the jury.

A highway traveler approaching a railroad crossing is bound to look and listen but whether he is bound to stop is a question not of law but of fact.

Under an averment that the defendant carelessly managed its train, the plaintiff may show a failure to give the proper signals with whistle and bell.

Injuries not specifically alleged may be shown if they resulted from such as are specified.

The record disclosed a proper case for the impeachment of a witness by proof of his contrary statement out of court.

ACTION ON THE CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1896, Rutland County, *Taft*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff, a child of six years, was riding with an aged man, Mr. Higgins, and his wife, over a crossing of the defendant railroad when the carriage was run into by the defendant's train, the man and woman instantly killed and the plaintiff thrown out and injured. The other material facts appear in the opinion.

Butler & Maloney for the defendant.

A verdict should have been directed. If Mr. Higgins looked he must have seen the train before he or it reached

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the crossing. If he did not look he was chargeable with negligence as matter of law. *Chicago, etc., R. Co.* v. *Houston,* 95 U. S. 697; *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177; *Beisergel* v. *R. Co.*, 40 N.Y. 9; *Pence* v. *Chicago, etc., R. Co.*, 19 Am. & Eng. R. Cas., 366; *U. P. R. Co.* v. *Adams,* 19 Am. & Eng. R. Cas. 376; *Matti* v. *Chicago & W. Mich. R. Co.*, 32 Am. & Eng. R. cas. 71; *Haas Admr.* v. *Grand Rapids & Ind. R. Co.*, 47 Mich. 401; *Penn. R. Co.* v. *Beale*, 73 Pa. St. 504.

The evidence did not warrant the submission to the jury of the question of the defendant's negligence. As to the sounding of the whistle, no statutory regulation was alleged or proved. *Vandewater* v. *N. Y. & N. E. R. Co.*, 135 N.Y. 583. Some of the plaintiff's own witnesses testified that the signals were duly given.

It was Mr. Higgins' duty to stop as well as look and listen. *Zimmerman* v. *Hannibal St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191; *Reading & Columbia R. Co.* v. *Ritchie*, 102 Pa. 425; *Penn. R. Co.* v. *Beale, supra*; *N. Y., Phil. & Norfolk R. Co.* v. *Kellam's Admr.*, 32 Am. & Eng. R. Cas. 114; *Terre Haute R. Co.* v. *Clark*, 6 Am. & Eng. R. Cas. 88; *Wilds* v. *Hud. Riv. R. Co.*, 29 N. Y. 314; *Donohue* v. *St. L. I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 673; *Stepp* v. *Chicago, etc., R. Co.*, 85 Mo. 229.

There was no averment of negligence in respect to signalling or speed; hence testimony on those subjects should have been excluded. *Spaulding* v. *Warner*, 57 Vt. 654.

So too it was error to admit evidence of injuries not described in the declaration. *Thompson* v. *Nat. Express Co.*, 66 Vt. 359.

The court erred in permitting the impeachment of the witness Dibble. *Fairchild* v. *Bascomb*, 35 Vt. 417.

Wm. H. Preston and *Joel C. Baker* for the plaintiff.

There was a conflict of testimony, which made a question for the jury. *Barber* v. *Essex*, 27 Vt. 62.

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The law did not require Higgins to stop. *Davis* v. *N. Y. C. & H. R. R. Co.*, 47 N. Y. 400.

ROWELL, J. The defendant moved for a verdict, for that there was no testimony tending to show negligence on its part, and for that the testimony disclosed contributory negligence on the part of Higgins, with whom the plaintiff was riding at the time of her injury, and whose negligence, the defendant claimed, was imputable to her.

The motion was properly overruled as to the first ground; for although all of the defendant's testimony, and a large part of the plaintiff's, tended to show that the whistle was blown and the bell rung seasonably and sufficiently, yet some of the plaintiff's tended to show the contrary, which made the question of the defendant's negligence for the jury.

We also think that the motion was properly overruled as to the second ground. For some little distance south of where the highway turns to cross the railroad, to a point thirty-two feet east of the center of the track at the crossing, a train cannot be seen approaching from the south. But at that point the track can be seen in that direction a distance of five hundred and three feet. As you approach the crossing, going west, it is seen less and less, for it curves in the rock cut, the west side of which obstructs the view more and more as you advance. Higgins had a very gentle horse, which was walking slowly. Some of the testimony tended to show that the train was running rapidly, and that the whistle was not blown nor the bell rung until it was in dangerous proximity to the crossing. The defendant claims that if Higgins had looked, he must have seen the train; and if he did look and undertook to cross in front of it, he was negligent; and if he did not look and listen, he was equally negligent. But the jury has found that he could not have prevented the accident if he had looked and listened. It cannot be told with any certainty whether the train was in sight or not when he reached the thirty-two foot point. The jury seems to have thought that it was not in sight, for

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if it had been, and he had seen it, he could have avoided the accident by stopping, for his horse was exceedingly reliable, to his knowledge. The defendant undertakes to demonstrate by figures that it was in sight. But the data for such demonstration are too uncertain to be reliable. The case, on the testimony, was fairly for the jury on the question of contributory negligence.

The defendant requested the court to charge that it was Higgins' duty on approaching the crossing to stop, look and listen for approaching trains, and that if by doing so he could have avoided the accident and he did not do it, he was guilty of contributory negligence, and the plaintiff could not recover. The court complied with the request, omitting the word "stop," to which omission the defendant excepted. The omission was right. A traveler approaching a railroad crossing is not bound as matter of law to stop in order to avoid the imputation of negligence. He is bound to make vigilant use of his sight and hearing to discover and avoid danger, such use as a careful and prudent man would make in the same circumstances. If it is necessary for him to stop in order to do that, then he must stop; but it is for the jury to say whether it was necessary or not. This is the general rule, although in Pennsylvania and a few of the other states it is held as matter of law that he must stop. *Kellogg* v. *N. Y. C. & H. R. R. Co.*, 79 N. Y. 72; Note to *Ernst* v. *Hudson River R. R. Co.*, 90 Am. Dec. 783; *Tyler* v. *New York & New England R. R. Co.*, 137 Mass. 238; *Atchison, etc. R. R. Co.* v. *Hague*, 54 Kansas 284: 45 Am. St. Rep. 278, 284; 4 Am. & Eng. Ency. of Law, p. 68, § 33 and notes.

The averment that the defendant so carelessly and negligently drove and managed its locomotive engine and train of cars that they struck and injured the plaintiff, was sufficiently broad to let in the testimony that the whistle was not blown nor the bell rung, as that was a part of the management of the engine and train.

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Testimony that as a result of plaintiff's injuries she had curvature of the spine and defective eyesight was objected to, for that the declaration contains no allegation in respect of them. But if they resulted from the injuries specified in the declaration, they could well be shown; and if necessary to avoid a reversal, we should assume that they did so result, as the contrary does not appear.

On cross-examination of the defendant's witness Dibble, who was a passenger on the train at the time of the accident, he was asked if he had not told certain persons that the train was running desperately at the time, and denied it. In rebuttal the plaintiff was permitted to show that he had so stated. Defendant claims that this was error, for that the witness was the plaintiff's on that point, as the defendant did not inquire of him concerning the speed of the train. But the defendant asked him if the train stopped before it reached the station, and he answered that it did, and "very abruptly," which attracted his attention. The speed of the train was a controverted question, and this answer had some tendency to show that it was not running unusually fast. Consequently the plaintiff's inquiry of the witness was legitimate cross-examination, and the impeachment of him in rebuttal, proper.

Judgment affirmed.

STATE *vs.* WM. H. McMILLAN.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Construction of Statute—Bucket-Shop—Indictment Insufficient.

V. S. 5128, 5130, were originally passed as parts of an act the declared intention of which was to suppress the business conducted in bucket-

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shops, and this intention is to be considered in construing the sections as they now stand without that declaration of intention.

Hence an indictment under V. S. 5128, charging the respondent with keeping a bucket-shop wherein the prohibited business was conducted and permitted, is insufficient if it fails to allege directly that such business was conducted or permitted by the respondent.

V. S. 5130 does not create a substantive offense independent of that created by 5128, but creates one that is accessory thereto, and the prohibited acts, to be criminal, must be done with a view to the transactions mentioned in 5128. Consequently an indictment which fails to allege that the acts complained of were so done is insufficient.

INDICTMENT in two counts under V. S. 5128 and 5130 respectively, to which the respondent demurred. At the June Term, 1896, Caledonia County, *Ross*, C. J., presiding, there was a *pro forma* judgment overruling the demurrer and holding the indictment sufficient. The respondent excepted, and the cause was passed to this court before final judgment as provided by V. S. 1629.

The indictment, omitting the formal introduction, was as follows: That, William H. McMillan of St. Johnsbury in the County of Caledonia, on the first day of June, A. D. 1896, and at divers other times and days both before and since said first day of June, at St. Johnsbury in the County of Caledonia aforesaid, did keep and cause to be kept, and did aid, abet and assist divers other persons to keep and cause to be kept, a bucket-shop, to wit: an office, in which said bucket-shop, to wit: said office, was then and there conducted and permitted the pretended buying and selling of stocks and bonds of divers corporations and the pretended buying and selling of petroleum, cotton, grain, provisions, pork and other produce, on margins and otherwise, there being then and there no intention of receiving and paying for such stocks and bonds and such petroleum, cotton, grain, provisions, pork and other produce, so bought by divers persons to your Grand Jurors unknown, and with then and there no intention of delivering such stocks and bonds and such petroleum, cotton, grain, provisions, pork and other produce, so sold by divers other persons to your

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Grand Jurors unknown; and * * * * did then and there keep and cause to be kept and did then and there aid, abet and assist divers other persons to your Grand Jurors unknown to keep and cause to be kept, a bucket-shop, to wit: an office, in which bucket-shop, to wit: said office, was then and there conducted and permitted the pretended buying and selling of such stocks and bonds of divers corporations and the pretended buying and selling of such petroleum, cotton, grain, provisions, pork and other produce, on margins; and * * * * did then and there keep and cause to be kept, and did then and there aid, abet and assist divers other persons, to your Grand Jurors unknown, in keeping and causing to be kept, a bucket-shop, to wit: an office, in which said bucket shop, to wit; said office was then and there conducted and permitted the pretended buying and selling of such stocks and bonds of divers corporations and the pretended buying and selling of such petroleum, cotton, grain, provisions, pork and other produce, that is to say that he, the said William H. McMillan, did then and there keep and cause to be kept and did aid, abet and assist divers other persons to your Grand Jurors unknown, in keeping and causing to be kept, such bucket-shop, to wit: such office, in which bucket-shop, to wit: such office was then and there conducted and permitted the buying and selling of such stocks and bonds and such petroleum, cotton, grain, provisions, pork and other produce, when the party buying such stocks and bonds and such petroleum, cotton, grain, provisions and other produce then and there did not intend actually to receive the same if purchased and where the party selling such stocks and bonds and such petroleum, cotton, grain, provisions, pork and other produce then and there did not actually intend to deliver the same if sold, contrary, etc.

And the Grand Jurors aforesaid, etc., that the said William H. McMillan, on, etc., and at divers other times at, etc., did communicate, receive, exhibit and display offers by

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divers persons, to your Grand Jurors unknown, to buy and sell stocks and bonds of corporations and petroleum, cotton, grain, provisions, pork and other produce, on margins, without the intention of receiving and paying for such property so offered to be bought, or of delivering such property so offered to be sold; and did then and there communicate, receive, exhibit and display statements and quotations of the prices of such stocks and bonds and such petroleum, cotton, grain, provisions and other produce, with a view to such pretended purchase and sale as aforesaid, contrary, etc.

Bates & May for the respondent.

The crime consists not in keeping the shop but in conducting or permitting the prohibited business therein. The keeping must be accompanied with certain prohibited acts. The statute must describe and the pleader must set forth such illegal transactions "with reasonable particularity of time, place, and circumstances." *State* v. *Day*, 3 Vt. 138; *State* v. *Benjamin*, 49 Vt. 101; *State* v. *Higgins*, 53 Vt. 191; *State* v. *Clancy*, 56 Vt. 698; *State* v. *McCone*, 59 Vt. 117; I Arch. Cr. Pr. 285 and note; II Hawk. P. C. c. 25, § 57.

The indictment is silent as to who had the unlawful intention. *Com.* v. *Dean*, 110 Mass. 64.

The second count is framed upon V. S., 5130. But that section has no force independently of 5128. It refers to the same transactions and the count thereon is bad for the same want of particularity which makes the first count defective. I Bish. Cr. Pro., (1 ed.) 547, 548; *Shannon* v. *People*, 5 Mich. 71; *State* v. *Ricker*, 29 Me. 84.

W. H. Taylor, State's Attorney, for the State.

The first count charges the offense in the language of the statute, which is sufficient. *Fortenbury* v. *State*, 47 Ark. 188; *State* v. *Casey*, 45 Me. 435.

A *pretended* buying and selling implies a lack of intention

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to receive and pay for the subject of the sale. *State* v. *Campbell*, 29 Tex. 44: 94 Am. Dec. 251.

It is unnecessary to allege the names of the persons with whom the pretended buying and selling is conducted. Clark's Crim. Proc. 161; Bish. St. Cr. §§ 892, 894, 895.

The second count also alleges an offense in the language of the statute. The place where the acts prohibited in this section are performed is immaterial.

ROWELL, J. This indictment, which is demurred to, contains two counts. The first is based on section 5128 of the Vt. Sts., and the second, on section 5130. These sections, with the others under the head of "Stock Gambling," were first passed in 1888, in an act to suppress "bucket-shops and gambling in stocks, bonds, petroleum, cotton, grain and provisions." It was the intention of that act, as therein declared, to prevent, punish and prohibit within this State, the business engaged in and conducted in places commonly known and designated as bucket-shops, including the practice commonly known as bucket-shopping by persons, corporations, etc., who ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, petroleum, stocks and bonds. Although this declaration of intention is not contained in Vt. Sts., it may be considered in construing the sections in question.

Section 5128 provides that no person nor corporation shall keep nor cause to be kept a bucket-shop, office, store nor other place, in which is conducted or permitted the pretended buying or selling of stocks, bonds, etc., on margins or otherwise, without any intention of receiving and paying for the property so bought or of delivering the property so sold; nor in which is conducted or permitted the pretended buying or selling of such property on margins; nor when the party buying or offering to buy such property does not intend actually to receive the same if bought or to deliver it if sold.

The first count alleges that the prisoner kept and caused

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to be kept "a bucket-shop, to wit, an office, in which said bucket-shop, to wit, said office, was then and there conducted and permitted the pretended buying and selling of stocks, bonds," etc., following the words of the statute. This does not, directly at all events, charge the prisoner with conducting nor permitting the business that made said office a bucket-shop. If it charges him with it at all, it is only by inference and argument, which is not enough. For aught that can properly be gathered from the count, the business may have been conducted and carried on there by others without the permission or even the knowledge of the prisoner. The offense created by this section is the keeping of a bucket-shop, and that is what the prisoner is charged with; but in order to be guilty of that offense, he must in some assignable way have conducted or permitted the business that made the place a bucket-shop. The precedents for keeping gaming houses are instructive. After alleging the keeping of the house, they directly connect the prisoner with the business carried on therein that makes the place a gaming house, by alleging that he caused and permitted divers persons to frequent and come together there to game, and to be and remain there for that purpose, and that he procured, permitted and suffered them there to game and play together. III Chit. Crim. Law 673 and following. The first count, therefore, is bad for the reason stated, which makes it unnecessary to consider the other objections made to it.

Section 5130 provides that it shall not be necessary in order to commit the offense defined in § 5128, that both the buyer and the seller agree to do any of the acts therein prohibited, but that the offense shall be complete against a person or corporation thus pretending or offering to sell or to buy, whether the offer is accepted or not; and that a person or corporation communicating, receiving, exhibiting, or displaying in any manner such offer so to buy or to sell, or any statements or quotations of the prices of such property,

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with a view to such transaction, shall be deemed an accessory, and punished as provided in case of one who violates § 5128.

It is upon the last part of § 5130 that the second count is based. But that section does not create a substantive offense, independent of the offense created by § 5128, which is the keeping of a bucket-shop, but creates one that is accessory to it, as the section declares; and the things prohibited by the section, in order to constitute an offense under it, must be done with a view to transactions mentioned in § 5128, namely, to transactions in a place the keeping of which is there prohibited. This count makes no allegation that the things complained of were done with a view to transactions in such a place, and is therefore bad.

Judgment reversed, demurrer sustained, indictment adjudged insufficient and quashed, and the prisoner discharged.

I. H. P. ROWELL *vs.* M. J. DUNWOODIE.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Statute of Frauds—Common Counts—Exception.

The defendant, a residuary legatee, promised the plaintiff in writing that, if he would withdraw his opposition to the allowance of the will, and if the estate should prove large enough to pay all debts and legacies, and if no appeal should be taken by creditors or otherwise, she would pay the plaintiff two notes held by him against the deceased, as well as one-half of an account for legal services, which notes and account the writing stated to be the only claims in favor of the plaintiff. *Held*, that the memorandum satisfied the statute of frauds although it did not mention the amount of the notes.

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The plaintiff upon production of the notes and proof that the conditions of the contract had been fulfilled was entitled to recover in general assumpsit.

The defendant's promise was not collateral to that of the testator, but absolute upon the plaintiff's performance of the conditions.

The trial court rejected the offer of the notes and, later, directed a verdict for the plaintiff for the amount of the account. The plaintiff excepted to the action of the court in excluding the notes but not in directing the verdict. *Held*, that by excepting to the exclusion of the notes as evidence, he saved his right to insist upon a recovery of the amount due upon them.

ASSUMPSIT in the common counts. Plea, the general issue. Trial by jury at the September Term, 1895, Washington County, *Thompson*, J., presiding. Verdict, by direction of the court, for the plaintiff for the amount of the account named in the contract, and judgment thereon. Both parties excepted.

The plaintiff claimed to recover upon the written contract recited in the opinion and introduced the same in evidence. The defendant excepted to its admission on the ground that the plaintiff could not recover thereon under the common counts.

The plaintiff offered in evidence two notes purporting to be signed by the testator, payable to the plaintiff, or bearer, and offered oral evidence to identify them as the notes mentioned in the contract and to prove that they had been kept alive as against the statute of limitations. The court excluded the notes on the ground that the statute of frauds required the memorandum to be complete and that oral evidence was not admissible to identify the notes. To the exclusion the plaintiff excepted.

The plaintiff's evidence tended to prove that all the conditions of the written contract had been fulfilled. No question was made but that one-half of the account referred to in the writing amounted to $29.40, and the court directed a verdict for the plaintiff for that amount. The defendant excepted thereto on the ground that recovery could not be had under the common counts. The plaintiff did not ask to

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go to the jury on any question and took no exception to the action of the court in directing a verdict.

T. R. Gordon for the plaintiff.

The terms of the special contract having been performed, leaving nothing to be done but the mere payment of money, a recovery under the common counts was permissible. *Bradley* v. *Phillips*, 52 Vt. 517; *Kent* v. *Bowker*, 38 Vt. 148; *Perry* v. *Smith*, 22 Vt. 301; *Mattocks* v. *Lyman*, 16 Vt. 118; *Wilkins* v. *Stevens*, 8 Vt. 214; *Way* v. *Wakefield*, 7 Vt. 223; *Bank of Columbia* v. *Patterson's Admr.*, 7 Cranch 299.

The promise was not within the statute of frauds. It was made upon a new consideration and was not in any sense collateral to the promise of the original debtor. *Bailey* v. *Bailey*, 56 Vt. 398; *Williams* v. *Little*, 35 Vt. 323; *Templetons* v. *Bascom*, 33 Vt. 135; *Cross* v. *Richardson*, 30 Vt. 647; *Lampson* v. *Hobart's Est.*, 28 Vt. 700.

But if the promise was collateral, oral evidence was admissible to identify the notes.

Geo. W. Wing and *Dillingham, Huse & Howland* for the defendant.

The plaintiff could not recover under the common counts. He has not released his claim against the original promisor and the defendant is merely a surety or guarantor. The consideration for the defendant's promise was that the plaintiff should withdraw his opposition to the will, not that he should forbear enforcing his claim against the estate. *Arbuckle* v. *Templeton*, 65 Vt. 205.

Hence the contract is within the statute of frauds. *Fullam* v. *Adams*, 37 Vt. 394.

The memorandum was insufficient because it required oral evidence to supply its terms. *Ide* v. *Stanton*, 15 Vt. 685.

The plaintiff lost his right to claim a recovery for the amount of the notes by failing to except to the action of the court in directing a verdict for the amount of the account only. The defendant, indeed, excepted to that action but is

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willing to let the verdict stand as it is. *Stock Quo. Tel. Co.* v. *Board of Trade*, 144 Ill. 370; *Curtis* v. *Wheeler & Wilson Co.*, 141 N. Y. 511.

TYLER, J. The plaintiff claims to recover, in the common counts in assumpsit, upon a written agreement, signed by the defendant, which is as follows:

"I, M. Jennie Dunwoodie, of Montpelier, Vermont, named as residuary legatee in the will of Joseph B. Rowell, late of Montpelier aforesaid, now pending for probating in the probate court for the district of Washington, Vermont, hereby agree to pay I. H. P. Rowell of Montpelier, Vermont, two notes he holds against the said Joseph B. Rowell, with the interest thereon, upon the following conditions:

"1st. The said Rowell shall withdraw from opposing the probating of said will and allow the same to be probated.

"2nd. That the estate shall be solvent and that sufficient shall be realized therefrom to pay all legacies and debts.

"3d. In case no appeal is taken by anyone interested in said estate as a creditor or otherwise.

"In case an appeal shall be taken, no liability shall attach to the said M. Jennie Dunwoodie until such appeal is determined; and if such determination shall be adverse to her, then said M. Jennie Dunwoodie shall be discharged from all liability under this agreement.

"The said Rowell has an account for legal services and costs against Joseph B. Rowell, for one-half said amount, estimated to be from twenty to thirty dollars—which is to be paid, subject to the above conditions, by the said M. Jennie Dunwoodie; and the said Rowell has no other claim against said estate."

The plaintiff's evidence tended to show that all the conditions of the agreement had been fulfilled, and the defendant made no claim that the 1st, 2nd and 3rd conditions had not been performed. The question is whether the agreement satisfies the statute which requires that a promise to answer for the debt of another shall be in writing.

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If the promise had been to pay a specific sum of money, as $142.99—the face of the two notes—no question could be raised but that the debt was definitely described. But now it is contended that the contract is partly in writing and partly dependent upon parol evidence, and therefore within the statute.

The rule of law is that enough should appear in the writing to show that a contract has been concluded which is legally binding upon the party sought to be charged; that the written note or memorandum must, either by its own language or by reference to something else, contain such a description of the contract actually made as shall obviate the necessity of resorting to parol evidence in order to supply any term of the contract essential to give it validity. *Ide & Smith* v. *Stanton*, 15 Vt. 685.

The plaintiff offered in evidence two notes, signed by the testator, which were excluded. If the writing had been indefinite, so that it might have applied to different notes, the ruling of the court excluding them would have been correct. But it appears by the writing that these two notes and the account were all the claims that the plaintiff had against the estate, so that their identity was established by their production, and parol evidence was necessary only for the purpose of fixing the amount due upon them. So we are not required to go beyond the rule in *Ide & Smith* v. *Stanton* to inquire how far parol evidence might be resorted to in order to identify the subject matter of the contract.

Upon proof that the plaintiff had complied with the terms of the agreement and the admission of the notes in evidence he would have been entitled to recover in general assumpsit. A case would have been made where nothing remained for the defendant to do but to pay over the amount due upon the notes.

The defendant's promise was not collateral to that of the testator. It was absolute upon the plaintiff's performance of the conditions, and was obviously for the defendant's benefit, she being the residuary legatee under the will.

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The defendant makes the further point that the verdict and judgment for the plaintiff to recover the amount of his account preclude him from a recovery upon the notes. This cannot be maintained. The plaintiff's exception to the ruling of the court excluding the notes as evidence saved his right in respect to a recovery of the amount due upon them.

Judgment reversed and cause remanded.

FRED E. MASCOTT and EMMA MASCOTT *vs.* FIRST NATIONAL FIRE INSURANCE CO.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Insurance Policy—Written and Printed Portions—Title of Insured—When Neither Party Requests Submission to Jury—Fact Material to Risk.

A policy of fire insurance upon a building provided that the policy should be void if the land whereon the building stood was not owned in fee simple by the parties insured. *Held*, enough that the combined interests of the insured amounted to such a title.

A policy of fire insurance provided in its written portion that the building insured should be occupied as a paint-shop; but provided in its printed portion that the use of benzine upon the premises should render the policy void. The building was consumed by a fire caused by the use of benzine therein, yet an action was maintained upon the policy, it being proved that benzine was necessarily used in the occupation of the building as a paint-shop.

As neither party desired to go to the jury it was for the court to direct a verdict on such a state of facts as it considered proved; and the verdict will be upheld if there was any evidence to sustain it.

The insurance being for nine hundred and sixty dollars and the property worth two thousand five hundred dollars, it could not be said as matter of law that the existence of a mortgage for two hundred dollars was a fact material to the risk.

It was for the jury to say whether under the circumstances the failure to disclose the existence of the mortgage was a concealment of a material matter, under a clause which provided that if the insured had concealed

any material fact concerning the insurance the entire policy should be void.

ASSUMPSIT upon a fire insurance policy. Plea, the general issue. Trial by jury at the March Term, 1896, Rutland County, *Taft*, J., presiding. At the close of the testimony the defendant moved for a verdict, and, the motion being denied, did not desire to go to the jury on any issue of fact. The court then directed a verdict and rendered judgment thereon for the plaintiff. The defendant excepted.

Henry L. Clark, *J. C. Baker* and *F. W. McGettrick* for the defendant.

The fact that Fred E. Mascott had no interest in the real estate except as husband, makes the policy a mere wager as to him.

The failure to disclose the existence of the mortgage was a material concealment and rendered the policy void.

The use of benzine upon the premises invalidated the policy. *Allen* v. *Ins. Co.*, 123 N. Y. 6; *Moore* v. *Ins Co.*, 62 N. H. 240; *Wheeler* v. *Ins. Co.*, 62 N. H. 329. The fire was caused by the use of the prohibited article and the restriction should be given full effect. *Moore* v. *Ins. Co.*, 72 Iowa 416; note, 13 Am. St. Rep. 585; *Weisenberger* v. *Ins. Co.*, 56 Pa. 444.

This insurance was upon the building only and did not in terms insure benzine. Hence *Mascott* v. *Ins. Co.*, 68 Vt. 253, is not controlling.

Wm. H. Preston, *F. S. Platt* and *Butler & Maloney* for the plaintiff.

START, J. The action is assumpsit upon a fire insurance contract, by which the plaintiffs were insured in the sum of nine hundred and sixty dollars on their two-story frame building, occupied for a storehouse and paint-shop. The policy contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circum-

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stance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." The policy further provided, that, unless otherwise provided by an agreement indorsed thereon or added thereto, the policy should be void if the interest of the insured was other than unconditional and sole ownership; or if the subject of the insurance was a building on ground not owned by the insured in fee simple, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there was kept, used or allowed on the premises, benzine.

As the defendant did not desire to go to the jury upon any issue of fact, the following circumstances must be considered in passing upon the questions presented by the defendant's motion for a verdict: That the building was insured as a storehouse and paint-shop; that it was consumed by fire; that the fire was caused by the use of benzine, mixed with asphaltum, in the paint-shop; that benzine was an article necessarily used in a paint-shop and indispensable in the business; that the damage equalled or exceeded the insurance; that due notice and proofs of loss were furnished; that plaintiff Emma owned in fee simple the land on which the building was erected; that the building was erected with money belonging in part to both plaintiffs; that the building and lot were worth twenty-five hundred dollars; that there was a mortgage for two hundred dollars on same at the time the contract of insurance was made and ever since has been; and that the incumbrance was not represented to the defendant at the time the contract of insurance was made. It did not appear that any written application for insurance was made by the plaintiffs, nor that the agent of the defendant made any inquiries respecting incumbrances.

(1) The defendant insists that the contract of insurance is void because the plaintiffs were not owners in fee simple of the land on which the building was erected, and this fact was not indorsed on the policy or added thereto. Emma

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Mascott held the legal title to the land, and the combined interest of the plaintiffs in the land was that of owners in fee simple; and it was not necessary that their respective interests should be set forth in the contract of insurance. The combined ownership in them is not inconsistent with the condition of the policy. The policy was not to be void by reason of the condition in regard to ownership, unless the building was on "*ground not owned by the insured in fee simple.*" It cannot be said that the building was on land not owned by the insured. If the conveyance of the land, the relation of the insured to each other, their marital rights, the manner of occupancy, the sum each contributed to the erection of the building, had been set forth in the policy, it would have appeared that their combined interest was that of owners in fee simple, and that they were the only owners of the land. Being such owners, the contract of insurance is not void because their respective interests are not set forth in, or endorsed upon, the policy. To hold such a contract void because of the condition in respect to the ownership of the land, there must be an ownership in some person other than the insured.

In *Rankin* v. *Andes Ins. Co.*, 47 Vt. 144, the action was upon a policy of insurance on a woolen factory, which was issued to the Essex Mills Co. and George H. Wilbur. The factory was owned by the Essex Mills Co. but was operated by Wilbur under a contract with the company. The court found, that, at the time of the proof of loss, Wilbur had no interest in the property insured. The policy provided, that, if the interest or property insured be leasehold, or that of mortgage, or any other interest not in fee simple, in case of real estate, or absolute as to personal property, such must be made known to the company and expressed in the policy. The court held that this condition was obligatory upon the insured only in cases where the united interest of the insured was less than absolute.

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In *Webster* v. *Dwelling House Ins. Co.* 53 Ohio St. 558: 30 L. R. A. 719, the representation made by the insured was that the property was owned jointly by them, when, in fact, the house was owned wholly by the wife. The policy was issued to the husband and wife, and it was held that they could jointly recover on the policy.

In *Wainer* v. *Milford Mutual Fire Ins. Co.* 153 Mass. 335, it is held, that, if a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest; and if he has an insurable interest, it is sufficient to describe the property as belonging to him, unless some inquiry is made of him, the answer to which amounts to a false warranty or a misrepresentation.

In *Dohn* v. *The Farmers' Joint Stock Ins. Co.* 5 Lansing's Rep. (N. Y.) 275, a condition in the policy required, that, if the applicant had a less estate than a fee in the property to be insured, he should state the nature of such estate; and it was held, that, inasmuch as no question as to the nature of the title of the applicant was included in the written form of application furnished by the company, it was liable upon such policy, although the title held by the insured was, in fact, an equitable one, only, under a contract of sale.

In *Imperial Fire Ins. Co.* v. *Dunham*, 117 Penn. St. 460: 12 Atlantic Rep. 668, the insurance was upon certain buildings on land which the insured had purchased, but on which he had made no payment. The policy contained a condition that insurance on buildings on land not owned by the insured in fee simple should be void, and it was held that the insured had an insurable interest.

In *Niblo* v. *The North American Fire Ins. Co.* 1 Sandford (N. Y.) 551, it is held, that the description of the buildings in a fire insurance policy as "his buildings" is not equivalent to a warranty on the part of the assured that he is the owner of the same; that it does not constitute a misrepresentation of the fact, when the only interest in the buildings is as tenant for a year; and that, where no inquiry is made

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or statement given, on the happening of a fire, he will recover according to his real interest.

(2) The defendant also insists that the contract of insurance is void because benzine was used in the building, contrary to a printed condition in the policy. The contract of insurance provided for the occupancy of the building for a paint-shop. Benzine, mixed with asphaltum, was used in the paint-shop; and it must be held, from the statements in the exceptions, that it was necessarily used and indispensable in the business authorized by the contract of insurance to be carried on in the building. It is fair to presume, that, when the defendant made the contract for insurance upon the building and authorized its use for a paint-shop, by a clause written in the policy, it was acquainted with the business usually carried on, the work usually done, the materials necessarily used in prosecuting the business, in a paint-shop; that it knew that the business authorized to be carried on could not be conducted in the usual and ordinary way without the use of benzine; that it included in the risk such materials as were necessarily used in the business and intended to permit their use; and that the written portion of the policy in this regard was intended to control the printed portion, prohibiting the use of benzine. It is a well established rule, that, when the written and printed portions of a policy are inconsistent, the written portion prevails, as it expresses the special agreement and declared intention of the parties at the time of the contract. *Carrigan* v. *Lycoming Fire Ins. Co.* 53 Vt. 418. It is clear that the parties intended that the paint-shop, as it was and as it must necessarily continue if used for the purposes authorized by the written portion of the policy, should be carried on with all the usual and necessary incidents thereto; and that as such it was protected by the contract of insurance. We think the rule is well settled, that, when a policy of insurance, by the written portions, covers property to be used in conducting a particular business, the necessary using of an

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article in such business will not avoid the policy, although the keeping and use of such article is prohibited by the printed portions of the policy.

In *Faust* v. *American Fire Ins. Co.* 91 Wis. 158: 30 L. R. A. 783, the written portion of the policy insured the building as a "furniture store and repair shop," and the printed portion declared that it should be void if benzine was kept on the premises. It was held that the policy was not forfeited by keeping benzine for necessary use in the repair shop.

In *Carlin* v. *Western Assurance Co.* 57 Md. 515: 40 Am. Rep. 440, the policy covered a factory and machinery and prohibited the keeping or use of petroleum. The court held, in effect, that, if the engine room and machinery were included in the description of the insured premises, the keeping of petroleum, although among the prohibited articles, would not avoid the policy, if the evidence showed that it was an appropriate and customary article used in the insured's business for lubricating machinery, and he kept it solely for that purpose; that the insurance company knew, when it issued the policy, that the factory could not run without machinery, and it must be supposed to have contracted with reference to such use as an ordinary incident of the business; that, if petroleum oil was usual and necessary, such use must have been contemplated, though prohibited in the printed portion of the policy.

In *Hall* v. *Ins. Co. of North America*, 58 N. Y. 292, it is held, that, where a policy is issued upon the material used in a business, it includes and authorizes the use of all such materials as are in ordinary use in the business, although, by the printed clause of the policy, the keeping or use thereof upon the premises is prohibited, and although other materials might be substituted.

In *Fraim* v. *National Fire Ins. Co.* decided by the Supreme Court of Pennsylvania in 1895 and reported in the Atlantic Reporter, vol. 32, p. 613, the policy was issued to a silver-

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plating company on its tools and machinery and prohibited the keeping or use of gasoline on the premises. The court, in holding that the use of gasoline in the company's business was not prohibited, said: "The general rule deducible from the text-books and adjudged cases as to such prohibitions, is that it is the intent of the parties to insure the subject of insurance as it necessarily is and must continue to be during the life of the policy."

In *Viele* v. *Germania Ins. Co.*, 26 Iowa 9: 96 Am. Dec. 83, the policy expressly prohibited the keeping of benzine upon the premises. It was necessary in the preparation of paints and varnish used in the manufacture of rustic window shades; and it was held that consent to the manufacture of window shades in the building implied a consent to use benzine, if it was necessary or commonly used in making those articles, and that the permission operated to dispense with the prohibition.

In *Citizens' Ins. Co.* v. *McLaughlin*, 53 Pa. 485: 6 Am. Law Reg. N. S. 374, the keeping of benzine upon the premises was prohibited. It was a necessary article in the manufacture of patent leather. The fire consuming the building was caused by benzine, and the court held that the permission to use the building for a patent-leather manufactory carried with it the permission to use all articles necessary to the business and dispensed with the prohibition in the policy.

The same rule is announced in *Harper* v. *Albany Ins. Co.*, 17 N. Y. 194; *Harper* v. *New York Ins. Co.*, 22 Id. 441; *Pindar* v. *Kings County Ins. Co.*, 36 Id. 648; *Collins* v. *Farmville Insurance and Banking Co.*, 79 N. C. 279: 28 Am. Rep. 322; *Whitmarsh* v. *Conway Ins. Co.*, 16 Gray 359; *Maril* v. *Connecticut Fire Ins. Co.*, 95 Ga. 604: 30 L. R. A. 835; *Wheeler* v. *Traders' Ins. Co.*, 62 N. H. 450: 13 Am. St. Rep. 582.

(3) The clause in the policy against concealment and misrepresentation provides that the entire policy shall be

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void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated therein. There was a mortgage of two hundred dollars on the property, and this fact was not represented to the defendant at the time the policy was issued; and it is insisted by the defendant that this was a concealment of a material fact. The evidence tended to show that the property was worth twenty-five hundred dollars. It did not appear on trial in the court below that any written application for the policy was made by the insured, nor that the agent of the company made any inquiry as to incumbrance.

The terms of the condition relied upon by the defendant are not those which would naturally direct the attention of the insured to the necessity of disclosing incumbrances upon the property, or suggest that they were material to the risk. A concealment of a fact not material would not avoid the policy. The question of whether the policy shall be void by reason of concealment or misrepresentation is, by the terms of the policy, made to depend upon their materiality. The fact that there is a mortgage for two hundred dollars would not seem to be material in effecting an insurance for nine hundred and sixty dollars. The defendant did not desire to go to the jury upon the question of whether such concealment was material, and we cannot, in view of the holding of the court below, assume that it was. As neither party desired to go to the jury on any issue of fact, it was for the court to direct a verdict on such a state of facts as it regarded proved by the evidence; and the verdict will be upheld if there is any evidence to sustain it. *Robinson* v. *Larabee*, 58 Vt. 652.

The evidence tended to show, that, if there was concealment or misrepresentation, it was not material. The insured were the owners of the property, notwithstanding

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there was a small mortgage thereon; and, under the findings of the court below, it must be held that there was no material misrepresentation or concealment respecting such ownership by reason of the undisclosed mortgage. If the company had intended that the policy should be void if the insured omitted to mention incumbrances, it could have made that intention clear by inserting the word "incumbered," instead of leaving it for the insured to conjecture respecting the materiality of facts and circumstances. The insured might well regard the existence of a small mortgage upon their property an immaterial fact, inasmuch as their attention was not directed to the subject of incumbrance by the defendant's agent or by the policy. A misrepresentation in insurance is a statement of something as a fact which is untrue, and which the insured states knowing it to be untrue, or which he states positively as true without knowing it to be true, with intent to deceive, and which has a tendency to mislead, such fact in either case being material; and the materiality of a representation or concealment is a question for the jury. *Daniels* v. *Hudson River Fire Ins. Co.*, 12 Cush. 416: 59 Am. Dec. 192; *Clark* v. *Union Mutual Fire Ins. Co.*, 40 N. H. 333: 77 Am. Dec. 721. Concealment, according to the law of insurance, is a designed and intentional withholding of any fact material to the risk, which the assured ought in honesty and good faith to communicate; and any fact is material, the knowledge or ignorance of which would materially influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance. *Clark* v. *Union Mutual Fire Ins. Co.*, *supra.*

In *Dolliver* v. *St. Joseph Fire and Marine Ins. Co.*, 128 Mass. 315, the policy contained the following provision: "If the interest of the assured be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be represented to the company, and so expressed in the written part of the policy;

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otherwise the policy shall be void." The assured, at the time the policy was issued, was the owner of the property in fee, but had mortgaged it and leased it for a term of years; and it was held that the policy was not thereby avoided.

In *Fletcher* v. *The Commonwealth Ins. Co.*, 18 Pick. 419, the plaintiff obtained insurance on his store without disclosing the fact that it stood on the land of another person, under a verbal agreement terminable at the pleasure of such person upon six months notice. No inquiry was made by the insurer in regard to his title. It was held that there was not a concealment of a material fact; that the policy was not thereby avoided; and that the materiality of the fact concealed was for the jury.

In *Commonwealth, by Insurance Commissioners,* v. *Hide & Leather Ins. Co.*, 112 Mass. 136, it is held that a provision in a policy of fire insurance that "the assured covenants and engages that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured," is waived by an insurer who issues the policy upon a bare request to insure the property, unaccompanied by any statement as to its condition, situation, value or risk.

In *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421: 3 Am. Rep. 149, the policy was issued upon the condition, that, if the interest of the insured in the property was a leasehold interest, or other interest not absolute, the company should be so informed at the time of contracting the insurance, or the policy would be void. The insured at the time the insurance was negotiated, was the owner of an equity of redemption only, and no mention of that fact was made. It was held that the interest of the insured as mortgagor was absolute, within the meaning of the policy, and no explanation of that interest was required before the issuing of the policy.

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In *Quarrier* v. *Peabody Ins. Co.*, 10 W. Va. 507: 27 Am. Rep. 582, the policy provides, that, if the interest of the insured be not truly stated, or is other than the entire, unconditional and sole ownership, it must be so expressed in the policy, under penalty of forfeiture. It was held that the policy was not rendered void by the failure of the insured to disclose, that, at the time the policy was issued, there was a deed of trust of the property insured, no inquiry having been made about the state of the title. The holding is, in effect, the same in *Manhattan Fire Ins. Co.* v. *Will*, 28 Gratt. 389.

Judgment affirmed.

IN RE HARRIET A. WELCH'S WILL: HARRIET ELLA HUBBARD FIELD, petitioner; HARRIET ANNA HUBBARD, appellant.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Appeals from Probate—Security for Costs—Right to Jury Trial—Common Law Pleadings Inapplicable.

The testatrix bequeathed a legacy to her "niece, Harriet Ellen Hubbard." The probate court first decreed the legacy to the appellant but afterwards ordered it paid to the petitioner. The appellant brought the case to the county court and obtained an order that the petitioner furnish security for costs. *Held*, that the order was unauthorized.

The appellant filed a plea alleging that the petitioner was not the person designated by the testatrix in the legacy. On demurrer, the plea was adjudged insufficient, for the proceeding is *in rem* to determine who, if any one, is entitled, and the common law method of reducing the inquiry to a single issue is inapplicable.

There is, in such cases, no constitutional right to a trial by jury, and the county court has discretionary power, under V. S. 1437, to order a reference.

V. S. 2596 and 1437 construed.

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APPEAL FROM PROBATE. Heard at the June Term, 1896, Addison County, *Rowell*, J., presiding, on motion of the appellant that the petitioner be ordered to furnish security for costs which motion was granted as matter of right, and on demurrer to the appellant's plea, which was overruled and the plea adjudged sufficient, and upon the appellant's motion for a trial by jury which was granted as a matter of right. All said rulings were *pro forma*. The petitioner excepted and the cause was passed to this court for determination upon said exceptions before final judgment.

The case is stated in the opinion.

Stewart & Wilds for the petitioner.

The appellant seeks to raise an issue of fact by pleading that the petitioner was not the person designated by the testatrix. To this plea the petitioner demurred. The proceeding does not admit of pleadings in this form and the demurrer should have been sustained.

There is no constitutional right to a trial by jury in this class of cases. Such was not the course at common law. *Sparhawk* v. *Buell*, 9 Vt. 41; *Howard* v. *Brown*, 11 Vt. 361; *Bellows* v. *Sowles*, 57 Vt. 411; *Weeks* v. *Sowles*, 58 Vt. 696; *Deeks* v. *Strutt*, 5 T. R 690; *Norris* v. *Hemingway*, 1 Hagg. Ecc. 4; *Capel* v. *Robarts*, 3 Hagg. Ecc. 161.

But if the construction of this will was a "question of fact" within the meaning of V. S. 2595 then V. S. 1437 applies and the county court has power to refer the case.

There was no authority for ordering the petitioner to furnish security for costs. V. S. 1408, 2345.

Bliss & Deberville for the appellant.

The appellant is entitled to security for costs. V. S. 2345, 1408, 2596, 2589. *Brigham's Heirs* v. *Brigham's Exrs.*, 15 Vt. 788; *Sargeant* v. *Sargeant's Exrs.*, 18 Vt. 330; *Bliss* v. *Little's Est.*, 64 Vt. 133; Rules of Court, No. 18; *Doane* v. *Doane*, 33 Vt. 644.

The plea was sufficient. It presented a decisive question

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of fact upon which issue could be joined and a trial had by jury pursuant to V. S. 2595.

Upon this question of fact the appellant is entitled to a trial by jury. V. S. 2595; Bill of Rights, Art. 12; Const. Vt. c. 2, § 31; *Huntington* v. *Bishop*, 5 Vt. 192; *Plimpton* v. *Somerset*, 33 Vt. 283; *State* v. *Peterson*, 41 Vt. 512; *In re Weatherhead*, 53 Vt. 653; *Lynde* v. *Davenport*, 57 Vt. 597; *Missionary Society* v. *Eells*, 68 Vt. 497, 513; *Ayres* v. *Weed*, 16 Conn. 291, 298; *Patch* v. *White*, 117 U. S. 210-817; *Venor* v. *Henry*, 3 Watts (Pa.) 385; Thomp. Trials, §§ 1083, 1333; *Maeck* v. *Nason*, 21 Vt. 115; *Backus* v. *Chapman*, 111 Mass. 386; *Cleverly* v. *Cleverly*, 124 Mass. 314, 316; *Thomas* v. *Thomas*, 6 T. R. 671.

V. S. 1437 can have no such sweeping effect as is claimed by the petitioner. Whenever "any issue of fact proper for the cognizance of a jury is joined in a court of law," recognized by legislature and court to be such, the constitutional right attaches. "Trials of issues proper for the cognizance of a jury * * * shall be by jury." This language looks to the future. The right is not to be abrogated by implication. *Huntington* v. *Bishop*, 5 Vt. 192; *Plimpton* v. *Somerset*, 33 Vt. 283; *Lynde* v. *Davenport*, 57 Vt. 597.

ROSS, C. J. By the will of Harriet A. Welch, which was duly probated, a legacy of five hundred dollars is given to Harriet Ellen Hubbard, a niece of the testatrix.

The probate court decreed this legacy to Harriet E. Hubbard, a niece of the testatrix, May 20, 1895. No niece of the testatrix, bearing the name of Harriet Ellen Hubbard, appearing to claim the legacy, October 4, 1895, Harriet Ella Hubbard Field, a niece of the testatrix, filed her petition in the probate court setting forth, that she is the person designated in the will, and that Harriet Anna Hubbard, also a niece of the testatrix, asserts that she is the person designated; that by reason of the uncertainty in the identification of the legatee named in the will and decree, the

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executors refuse to pay the legacy to the petitioner, and praying that the decree of May 20, 1895, be so corrected as to designate the petitioner as the distributee entitled to the legacy. On December 2, 1895, on hearing, the probate court decreed that the executors pay the legacy to the petitioner. Nothing being shown to the contrary, it is to be presumed that due notice of this application and hearing were given. Harriet Anna Hubbard claiming to be aggrieved by the decree, brought the matter to the county court by appeal. In the county court, on motion of the appellant, the petitioner, against her exception, was ordered to furnish security to the appellant for costs.

(1) Had the county court the legal power to make this order? It is only by force of statute that costs are allowed; *Tyler* v. *Frost*, 48 Vt. 486; or that a court has the right to require a party in a proceeding before it to give security for their payment. None of the sections of the statute, 2345, 1408, 2596, 2589, called to our attention by the appellant, give the court any power to require the petitioner to furnish security for the payment of costs. We are not aware that any such statute exists. The petition was not required to have, and did not have, any citation attached requiring the appellant to appear and answer before the probate court, and for this reason does not come within the provisions of § 2345. Section 1408, when in a pending case it is found that the recognizance taken for the payment of costs is insufficient, authorizes the court to order additional security for their payment to be given. V. S. 2589 requires the appellant to give to the court a bond to prosecute her appeal to effect and pay intervening damages and costs occasioned by the appeal. Section 2596 gives the supreme and county courts, in appeals from the probate court, power to tax or deny costs to the prevailing party. If under this section the county court might in its discretion, allow costs against the petitioner, if the appellant prevails, the section gives it no

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power to require the petitioner to furnish security for their payment. This exception is sustained.

(2) The appellant filed a plea alleging that the petitioner is not the person designated by the testatrix in the legacy. The plea is demurred to. Was it sufficient? In appeals from the probate court, the county court acts as a higher probate court. *Adams* v. *Adams*, 21 Vt. 162; *Holmes* v. *Holmes*, 26 Vt. 536; *Hilliard* v. *McDaniels*, 48 Vt. 122. It took by the appeal for determination and decision the identical matter which was before the probate court. The probate court had in hand the estate of the testatrix for distribution, in accordance with her will. By the will, a legacy of five hundred dollars is given a niece of the testatrix, called Harriet Ellen Hubbard. No niece answering that name in full appears to claim the legacy, nor is known to exist. The petitioner and appellant each bear some portion of the name. Whether the testatrix had other nieces which bear some portion of the name does not appear. It was for the probate court to determine, on proper investigation, whether the testatrix intended the legacy for the petitioner, the appellant, or some other niece bearing some portion of the name; or whether the legatee was so imperfectly and inaptly designated, that the legacy is void and becomes a part of the residue of the estate. No other determination would fully ascertain, and enable it to decree, the disposition which the executors should make of this five hundred dollars. The investigation by the county court, as a higher court of probate, must be as broad and cover the same ground as did the investigation in the probate court, to enable it correctly to determine and decree what is to be done with this legacy. It must fully determine and decree in regard to its disposition and certify its determination and decree to the probate court.

The plea of the appellant covered only a portion of the inquiry and investigation brought by the appeal to the county court for determination and decree. The plea might

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be found to be true, and the county court would have advanced only one step in the required investigation and determination. Hence it should have been adjudged insufficient on demurrer. The proceeding, in both courts, is in the nature of a proceeding *in rem;* namely, what shall the executors be ordered to do with that portion of the estate included in the legacy? Upon it, the decree would operate as well as upon the persons in contention in regard to it. The investigation was of such a character that the common law rules of pleading, which demand that a single issue shall be framed and joined, did not apply.

(3) The appellant moved for a trial by the jury; the petitioner for a trial by the court, or, if the court held that under V. S. 2595 there was a question of fact to be decided and an issue could be joined thereon suitable for the jury, then that, under V. S. 1437, the court in its discretion should appoint a referee to try the same. The court *pro forma*, as in its other rulings, held that the appellant had the right to a trial by the jury and that it could not legally exercise its discretion to appoint a referee. This holding was against the exception of the petitioner. In appeals from the probate court, V. S. 2595, provides: "When such certified copy is filed in the county court, it shall try the question; and if a question of fact is to be decided, issue may be joined thereon under direction of the court and a trial had by jury." As shown in considering the previous point, the final adjudication and determination in regard to the order which the court should issue to the executors for the payment of that part of the estate included in this legacy might involve inquiry into a number of facts. It would be difficult if not impossible, under rules of pleading at common law, to frame a single issue which would determine the question. Several issues might be framed by which a special verdict by the jury might determine all the facts necessary to enable the court to decide the question. While, whether the petitioner, the appellant, or some other niece of the testatrix, is the

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legatee intended by the testatrix, or whether the legatee could not be identified, are questions of fact, yet the determination of how many of them might be required to enable the court to make the proper order and judgment, could not be ascertained in advance of the trial.

It is evident from the language used, V. S. 2595 contemplates a case which can be fully determined by issues joined. Those issues might be joined on several counts embracing different matters involving the determination of several facts, but, from their determination the jury must be able to say that one of the parties to the issues, conclusively, is entitled to recover. The only parties appearing upon the record are the petitioner and appellant. Yet the facts established by the inquiry presented might conclusively show that neither of the parties are entitled to this legacy. Such is likely to be the result where the proceeding is, as this is, in the nature of a proceeding *in rem;* or to determine the identity of one out of a class to whom a portion of an estate is given; or, whether the description of the legatee, aided by extraneous, relevant facts, is so indefinite that the intended legatee cannot be ascertained with certainty, and, for that reason, the legacy fails and the sum appropriated falls into the residue. Such inquiries in England were not made on issues joined in the common law courts, but were conducted either in the ecclesiastical court or in the courts of equity, in neither of which was a jury available to a party as a matter of right. *Sparhawk* v. *Buell*, 9 Vt. 41; *Howard* v. *Brown*, 11 Vt. 361; *Plimpton* v. *Somerset*, 33 Vt. 283; *In re Weatherhead*, 53 Vt. 653; *Bellows* v. *Sowles*, 57 Vt. 411; *Lynde* v. *Davenport*, 57 Vt. 597; *Weeks* v. *Sowles*, 58 Vt. 696; I Story, Eq. Jur 552 to 595; I Pom. Eq. § 156; III Id. § 1155; Chitty, Pl. 101; *Deek* v. *Strutt*, 5 T. R. 690; *Norris* v. *Hemingway*, 1 Hagg. Ecc. 4; *Capel* v. *Robarts*, 3 Hagg. Ecc. 161. It is abundantly settled by the decisions of this court above cited that the constitutional right to a trial by jury secured by the twelfth article of the bill of rights and

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thirty-first section of chapter two of the constitution does not apply to questions raised in bills in equity, proceedings in admiralty and in probate. Very little in elucidation of when this right does and when it does not attach would be added by a review of these decisions. They uniformly hold that if the right of trial by jury attaches to such proceedings it is because conferred by statute, and not because secured by the bill of rights and constitution. Hence, were the contention sustainable, that V. S. 2595 confers the right of trial in this case by jury, it being a right conferred by statute, and not one secured by the constitution, it follows from V. S. 1437, which reads, "The supreme or county court may, in an action pending therein, when the issue is not such as to entitle the parties as matter of right under the constitution to trial by jury, appoint one or more referees to try and determine such issue, and may, by agreement of parties, appoint such referees in any cause pending in such courts," the county court had the discretionary power to appoint a referee to try and determine the issue. V. S. 1437 was passed subsequently to V. S. 2595 and qualifies the right of trial by jury conferred by the latter section when the same is not secured by the constitution.

Judgment reversed and cause remanded.

MARY T. ELLIOTT and URIAH ELLIOTT *vs.* E. R. JENKINS.

May Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Equitable Title—Highway Abutters—Evidence.

The defendant purchased of one Buzzell a lot of land and took possession of the same. Before receiving the deed he arranged with Buzzell to dedicate for highway purposes a strip along one margin, and

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accordingly such portion was omitted from the conveyance, the defendant being granted only a right of way thereover. The dedication was made and accepted by the public but for all except highway purposes the defendant continued to occupy the land with the knowledge and acquiescence of the orators and their grantors, more than fifteen years in all. The orators having acquired Buzzell's title sought to enjoin the defendant from all acts of occupation therein except as one of the public. *Held*, that whether the defendant's legal title was perfect or not his equity was superior to the orators' and the injunction should be denied.

The orators having brought the defendant into a court of equity, his equitable title and occupancy under it are available to him in defense, and for this purpose testimony tending to establish the facts above recited was admissible.

A purchaser who takes a conveyance of a public street from one not an abutting owner thereon is bound to inquire respecting the rights of abutting-lot-owners who are apparently exercising such rights to the middle of the street.

BILL IN CHANCERY. Heard on master's report and exceptions thereto at the December Term, 1895, Caledonia County. *Ross*, Chancellor, overruled the exceptions and decreed that the defendant be perpetually enjoined from all use of the disputed land except for highway purposes as one of the public. The defendant appealed.

The evidence upon which the master found the facts recited in the opinion respecting the defendant's equitable title was received against the objection and exception of the orators.

Bates & May for the defendant.

The defendant purchased and took possession of the disputed land from Buzzell in May, 1871, and was ever afterwards the equitable owner thereof subject to the rights of the public. It was the defendant who dedicated the land to the public. His possession under his equitable title was open, adverse and continuous for more than fifteen years, beginning before the dedication, and his equity is certainly superior to that of the orators.

Dunnett & Slack for the orators.

The defendant could acquire no title in the highway by adverse possession. R. L. 3125.

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The evidence as to the arrangement between the defendant and Buzzell was inadmissible. All negotiations were merged in the deed, and the oratrix had a right to rely upon her record title. II Pars. Contr. *p. 549; *Hakes* v. *Hotchkiss*, 23 Vt. 231; *Abbott* v. *Choate*, 47 Vt. 53.

START, J. The defendant is the owner of a house and lot situated on the west side of Pleasant Street and north side of Buzzell street in the village of St. Johnsbury. The lot on the south side of Buzzell street is owned by one Leeth, and the orator's lot is situated at the west end of Buzzell street and the defendant's lot. Prior to May, 1871, and before Buzzell street was laid out and the land over which it passes dedicated to the public for a street, Luke Buzzell owned all of the land now owned by the orators and the defendant. In May, 1871, the defendant purchased of Buzzell his lot and that part of the land over which Buzzell street is laid which is in controversy, went into possession of the same, and has ever since been in the possession and occupancy of his lot and of the margin of the street abutting thereon, so far as it is possible to have possession of land within the limits of a street. After the defendant purchased and went into possession of his lot and the land in dispute, and while Buzzell owned all of the land now owned by the orators, and a lane about twenty feet wide on the south side of the land purchased by the defendant, leading from Pleasant street to the orator's lot, and before the defendant had taken his deed, the defendant agreed with Buzzell to give a sufficient amount of his land, along his southern boundary adjacent to Buzzell's lane, to make, with the lane, a street three rods wide, with the understanding that Buzzell was to give the lane and make the whole into a street. This agreement and understanding was carried out, and the land thus given is now Buzzell street; and the land in controversy is the margin of the street abutting on the defendant's lot, and a part of the land so given by the defendant. Subsequently, and before the land so given had

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been accepted by the village of St. Johnsbury, Buzzell deeded to the defendant the land so purchased, except that portion which had been set apart for a street. The master refers to the orator's deed, and makes the question of whether they have the record title to the land in dispute depend upon the construction the court gives to the deed. Without construing this deed, or determining who has the record title, we shall, for the purpose of discovering whether the orators are equitably entitled to the relief prayed for, assume that they have such title.

The defendant gave the land in question for a public street, and with the knowledge and acquiescence of the orators and the grantors in their chain of title, has, for more than fifteen years, been in the possession and occupancy of the same, subject only to the rights of the public therein. During this time, he has exercised the rights and control of an abutter, owning the fee in the land to the center of the street; and, at the time the orators took their deed, he was in the possession and exercise of these rights, under circumstances which would indicate to an observer that he was doing so under a claim of right. The orators now seek to dispossess him and prevent a further exercise of these rights by the extraordinary remedy of injunction. Will a court of equity, under these circumstances, by mandatory injunction, dispossess and prevent the defendant from further exercising the rights of an abutter and equitable owner of the fee in the land he purchased and dedicated to the public for a street, after he has been in the exercise of such rights for more than fifteen years, with the knowledge and acquiescence of the orators and grantors in their chain of title? Before doing so, it becomes important to inquire whether the orators' equities are superior to those of the defendant.

It does not appear, that the orators, in purchasing this lot, paid any valuable consideration for the fee of the land over which the street is laid; that they made any inquiry

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respecting the defendant's rights or examined any records; that they took their deed, relying upon any deeds, records or representations respecting the ownership of the fee in the land within the limits of the street; or that they relied upon, or anticipated, any beneficial use of the street that was not common to the general public. Before one pays a valuable consideration to secure a conveyance of a public street, from one not an abutter thereon, for the purpose of a beneficial use therein, distinct from the general public, common prudence and fairness require that he inquire respecting the rights of lot owners abutting thereon, who are apparently in the exercise of the rights of abutters, owning the fee in the land to the center of the street. One not an abutter on a street in a city or village has no reasonable ground to anticipate a beneficial use of the street, distinct from the general public, by reason of his owning the fee in the land over which the street is laid. In Kent's Com., vol. 3, 433, it is said by Chancillor Kent that: "The presumption is, that owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public." In the same section, he says: "The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as a part and parcel of the grant. The idea of an intention in a grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to the universal practice." It has been held, that, when a person, owning the fee in the land over which a street passes, and an adjoining lot, conveys the lot, the land to the center of the street is also granted, unless specially reserved. *City of Dubuque* v. *Maloney*, 9 Iowa 450: 74 Am. Dec. 358; *Low* v. *Tibbetts*, 72 Me. 92 : 39 Am. Rep. 303; *Winter* v. *Peterson*, 24 N. J. L. 524 : 61 Am. Dec. 678; *Paul* v. *Carver*, 26 Penn. St. 223 : 67 Am. Dec. 413.

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In cities and villages, it is important that owners of lots abutting on streets have the free and uninterrupted use of the margin of the street for the beneficial use and enjoyment of their lots, subject only to the easement of the public. If property rights in a street can be exercised by a grantor of a lot, he may deprive his grantee of the means of entry into, and exit from, his house at points most convenient, and deprive him of lawns, shade trees, awnings, light, air, and many privileges, that, by the general understanding of the people and extensive and immemorial practice, he is entitled to. All these can be prohibited, to a greater or less extent, by the original owner, if his right of property remains after parting with his lots.

In this State, it is held, that, where one owns land abutting on a highway, the legal presumption, in the absence of evidence showing the fact to be otherwise, is, that such land owner owns to the middle of the highway; and, when one conveys land abutting on a highway in which he owns the fee, the law presumes that he intended to convey to the middle of the highway, and will give the deed such effect, unless the language used by the grantor in his deed shows a clear intent to limit the grantee to the side of the highway. *Buck* v. *Squiers*, 22 Vt. 489; *Marsh* v. *Burt*, 34 Vt. 289; *Morrow* v. *Willard*, 30 Vt. 118; *Maynard* v. *Weeks*, 41 Vt. 619. These principles would, doubtless, be controlling in this case, if, before the defendant took his deed from Buzzell, the village of St. Johnsbury had accepted the land dedicated and worked and opened it for public travel. But, notwithstanding this had not been done, these well recognized rules of construction, the immemorial custom, the general understanding among the people, should be considered by a court of equity, in connection with the acts of the orators and the grantors in their chain of title, in ascertaining what the orators understood and relied upon, and had a right to rely upon, respecting the defendant's rights when they took their deed, and in determining

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whether they are equitably entitled to the relief prayed for.

At the time the defendant took his deed, he and Buzzell had agreed to dedicate the land for a street, and had set it apart for that purpose. It is clear that they expected that the village would accept it, and the same would become a public street; but, inasmuch as the land had not been accepted, and the same was not then a public street, they provided in the deed that the defendant should have a right of way over the land they had set apart for, and expected would be, a public street. It would seem that this clause was inserted in the deed for the purpose of securing to the defendant a right of way, in case the village did not accept of the dedicated land, and not with a view of limiting the rights of the defendant as an abutter on the land in case it was accepted and opened as a public street, as the parties then intended and expected it would be. If the land had been accepted for a street, there would have been no occasion for inserting this clause in the deed. The acts of the parties indicate that such was the object and purpose of giving the defendant a right of way over the dedicated land. The defendant, after he took his deed, continued in the possession and occupancy of the land the same as before; and, in 1874, while Buzzell owned the orators' lot, the trustees of the village worked the land for a street and opened it for public travel.

The orators and the grantors in their chain of title have acquiesced in the defendant's occupancy and use of the margin of the street adjacent to his lot for more than fifteen years, without questioning his right to do so, or attempting to restrict his rights as owner of a lot abutting on the street, by reason of the clause in his deed from Buzzell giving him a right of way, and have thereby given a reasonable, practical, equitable, construction to the deed and the contract made between the defendant and Buzzell, whereby the land was dedicated to the public for a street. In *Jackson, ex. dem. Suffern* v. *McConnell*, 19 Wend. 175:

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32 Am. Dec. 439, it is held that the acquiesence in a boundary line is evidence of an agreement to abide by it, and, if continued sufficiently long to give title by prescription, is conclusive evidence. It is unnecessary to decide whether the defendant has a clear legal title to the land in question. He has an equitable title, and his equities are superior to those of the orators.

When the orators took a deed of their lot, they knew, or ought to have known, that the land in question had been set apart for a street; that it had been worked and was being used as such; and that the defendant's lot abutted thereon. They might well anticipate that he claimed the right of an abutter, owning the fee to the center of the street; and, doubtless, by inquiry, would have learned that he claimed and had exercised such rights ever since he purchased the land and dedicated it to the public for a street. We think they are chargeable with knowledge of such facts as they might have ascertained by reasonable inquiry. The situation and surroundings were such that they were under a duty to inquire respecting the defendant's rights and the character of his possession and occupancy. The presumption was, that the defendant owned the fee in the land over which the street passed to the center of it; but notwithstanding this presumption, the orators elected to take the deed under which they claim title without making inquiries that were suggested by the situation, surroundings and the character of the defendant's occupancy, and without making the inquiries they naturally would make, if they expected any beneficial use of the street, distinct from the general public. Aside from such use as was common to the public, they could not have reasonably expected to make any use of the title to the land over which the street was laid, unless for the purpose of annoyance to the lot owners. We think the defendant is the equitable owner of the fee in the land in question; that the orators took their title to the street, if any they have, under such

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circumstances that it must be held that they knew, or ought to have known, that the defendant was such owner and was, and had been for more than fifteen years, in the exercise and enjoyment of all the rights and privileges of an abutter, owning the fee in the land to the center of the street; that it would be inequitable to dispossess him and prevent him from a further exercise of these rights and privileges; and that the orators are not equitably entitled to the relief prayed for.

The orators having brought the defendant into a court of equity, his equitable title and his possession and occupancy under it are available to him in defense; and, for this purpose, the testimony received by the master, subject to the orators' exception, was properly admitted. *Sheldon* v. *Preva*, 57 Vt. 263; *Holmes* v. *Caden*, Id. 111; *Griffith* v. *Abbott*, 56 Vt. 356.

The decree of the court of chancery is reversed, and cause remanded, with mandate to enter a decree dismissing the orators' bill, with costs.

RENA M. STEVENS *vs.* I. E. GIBSON.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Plea Construed—Guaranty Absolute or Conditional.

A plea which alleges that the defendant signed the note without any consideration whatever, but also alleges that he did so at the request of the payee and his co-signers as a guarantor to the payee and that the payee loaned the money with that understanding, must be construed to mean only that the defendant received none of the money for which the note was given.

A promise to pay a note when due if the principal does not is an absolute guaranty.

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ASSUMPSIT in the common counts and a special count upon the promissory note herein copied. The defendant pleaded a special plea in bar, given below, to which the plaintiff demurred generally. Heard on demurrer at the June Term, 1896, Bennington County, *Start* J., presiding. Demurrer sustained and plea adjudged insufficient. The defendant excepted.

The note reads as follows:

"$500. Camden, N. Y., Oct. 27, 1893.

One year after date I promise to pay to the order of Mrs. W. T. Stevens, Five Hundred Dollars, at Camden, N. Y. Value received, with interest.

E. W. GIBSON,
A. L. GIBSON,
J. E. GIBSON,
R. F. FARGO."

Mrs. W. T. Stevens is the plaintiff.

The plea reads as follows: "That said note was given to the said plaintiff by E. W. Gibson and A. L. Gibson, makers thereof for a certain sum of money, to wit, the sum of five hundred dollars then loaned to them by the plaintiff and for their sole use and benefit, to wit, at Camden in the state of New York, to wit on the day 1893, as was well known to the plaintiff at the time she so loaned the same and received said note; that this defendant signed his name to said note with, and at the request of the said plaintiff and said E. W. Gibson and A. L. Gibson, who also signed it without any consideration whatever therefor, as was well known to the plaintiff at the time she loaned said money and received said note; and this defendant signed the same at the request of the plaintiff and the said Gibsons as aforesaid, to guarantee and as a guarantor to the plaintiff that he would pay said note when it became due if they did not, as was well known to said plaintiff, when she received the same and loaned said money, and she did receive said note and loan said money with that understanding; that at the time said note became due, to wit, on

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the 27th day of October, 1893, and for a long time, to wit, for one year and more thereafter, said E. W. and A. L. Gibson were possessed of a large amount of property and more than sufficient to satisfy said note beside what was exempt from execution, and which property was located and situate in Camden, New York, where they and the plaintiff then resided and still reside, and this defendant then resided and still resides in Bennington, Vermont; and said note then and during that time could have been collected from said property of the said E. W. and A. L. Gibson in due course of law as the plaintiff well knew; and no demand was made on said E. W. and A. L. Gibson or on the defendant or R. L. Fargo, the other person who signed said note, for the payment of said note when it became due, and no notice was given by the plaintiff or anyone in her behalf to this defendant when it became due that it had not been paid; nor did this defendant know or have notice from the plaintiff, or from anyone, for the space of one year and more after said note became due, that said note had not been paid, and at the time this defendant first knew said note had not been paid the said E. W. and A. L. Gibson were entirely insolvent and ever since have been and still are, and said note or any part thereof could not at any time since then and cannot now be collected of them or from their property."

Batchelder & Bates for the defendant.

The plea alleges that the defendant is a conditional guarantor. If he was he was entitled to notice of the principals' failure to pay and is discharged by the laches of the plaintiff. *Bank* v. *Haynes*, 8 Pick. 423; *Sandford* v. *Norton*, 14 Vt. 228; *Sylvester* v. *Downer*, 20 Vt. 361; *Keath* v. *Dwinnell*, 38 Vt. 286; *Morris* v. *Wardsworth*, 17 Wend. 103.

Barber & Darling for the plaintiff.

The plea itself shows a consideration for the defendant's contract.

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The defendant says he promised to pay the note when it became due if the other makers did not. But this is an absolute guaranty under the decisions in this State. *Smith* v. *Ide*, 3 Vt. 295; *Knapp* v. *Parker*, 6 Vt. 642; *Train* v. *Jones*, 11 Vt. 444; *Peck* v. *Barney*, 13 Vt. 93; *Sylvester* v. *Downer*, 18 Vt. 32; *Bank* v. *Downer*, 27 Vt. 539; *Noyes* v. *Nichols*, 28 Vt. 160; *Mitchell* v. *Clark*, 35 Vt. 104.

ROWELL, J. The note in suit reads, "I promise to pay," and is signed by four—two Gibsons other than the defendant, and Fargo. On the face of it the note is, in legal effect, joint and several, and the signers are makers. But the defendant seeks by his plea to stand as a conditional guarantor, damnified for want of notice of the principals' default.

If the plea is construed to allege that the defendant signed the note without any consideration whatever, as he contends it should be, it is repugnant, as it also alleges that he signed it at the request of the plaintiff and the other Gibsons, "to guarantee, and as a guarantor, to the plaintiff that he would pay said note when it became due if they did not," and that the plaintiff received the note and loaned the money with that understanding. This is certainly a sufficient consideration to support the defendant's undertaking. But when a pleading is capable of different meanings, it clashes with no rule of construction to construe it in the sense in which the pleader must be understood to have construed it, supposing him to have intended it to be consistent with itself. *Royce* v. *Maloney*, 58 Vt. 437, 445. Applying this rule, it is clear that the pleader meant that the defendant signed without consideration in that he received none of the money for which the note was given; for the plea alleges that the money was loaned to the other Gibsons, and was for their sole use and benefit, to the knowledge of the plaintiff when she made the loan and took the note.

The next question is whether the guaranty set up is

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conditional or absolute. The defendant claims that it is conditional, and relies largely on *Sandford* v. *Norton*, 14 Vt. 228, to show it. That case seems not to have been very fully reported. It shows that the defendant offered to prove by parol that after the note passed from the payee's hands, and before it became due, he put his name on the back of it as guarantor for the maker to Raymond, pursuant to an agreement then made between them without the concurrence of the maker; but the terms of that agreement are not stated, except that the court says in the opinion that if the testimony offered was credited, the defendant was in no sense a joint maker, but merely a collateral guarantor, and undertook to pay the note if the maker did not. But in *Sylvester* v. *Downer*, 20 Vt. 355, *Judge Redfield*, who delivered the opinion in *Sandjord* v. *Norton*, says that judgment was reversed in that case because the court excluded the testimony offered to show that at the time the defendant put his name on the back of the note he was understood to assume only the obligation of a common indorser, and therefore was entitled to demand and notice. He says he presided at the next trial, and admitted the testimony, and that the plaintiff obtained a verdict by showing demand and notice. The case went to the supreme court from that trial, and is reported in 17 Vt. 285. *Williams*, C. J., who delivered the opinion then, said it was to be taken that the testimony established that the defendant was not a maker nor a guarantor but an indorser. So that case is not much in point for the defendant in this case; but *Noyes & Co.* v. *Nichols*, 28 Vt. 159, is much in point against him. The language of the guaranty there was, "I will be accountable to you for all his contracts or agreements, as you and he may agree; and in case he does not fulfil them as agreed, I will guarantee the payment thereof." This was held to be an absolute guaranty. The court said that the addition of the words, "in case he does not fulfil them as agreed," did not alter the nature of the undertaking, nor

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impose any duties on the plaintiffs that would not exist without them, and that demand and notice were not necessary. That guaranty and this are alike in legal effect.

Judgment affirmed and cause remanded.

HARTFORD AS A SCHOOL DISTRICT *vs.* SCHOOL DISTRICT No. 13 IN HARTFORD.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Trial by Court—Findings of Fact and Conclusions of Law—Right of Abolished School District to Pay Outlawed Debt.

The county court having found and certified the facts regarding a certain order decided that "upon all the testimony in the case the defendant was not legally indebted thereon." *Held*, that this was a conclusion of law.

A party excepting to a judgment of the county court upon facts found by it, is not entitled to question, in the supreme court, items entering into the judgment but not specifically objected to below.

A school district abolished by the act of 1892 has a right, in settling its pecuniary affairs, to pay a just debt though barred by the statute of limitations, and may insist that such debt be deducted in determining the balance due from the district to the town.

GENERAL ASSUMPSIT. Plea, the general issue. Trial by court at the May Term, 1896, Windsor County, *Tyler*, J., presiding. Judgment for the plaintiff. The defendant excepted.

The action was brought to recover the funds in the hands of the defendant when the act of 1892 abolishing the former school districts went into operation.

The defendant, against the plaintiff's exception, introduced in evidence an order given one H. E. Tinker, in 1885, by the defendant's prudential committee, and claimed that the

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amount of the same should be deducted from the funds in its hands.

J. J. Wilson and *J. G. Harvey* for the defendant.

S. E. Pingree and *W. E. Johnson* for the plaintiff.

MUNSON, J. The question litigated before the county court was whether the balance otherwise payable to the plaintiff, as shown by the accounts of the defendant, should be reduced by an allowance of the Tinker order as an indebtedness of the district; and the court rendered judgment for the plaintiff for the balance shown by the accounts with that order disallowed. The defendant excepted to the introduction of the auditor's report showing the accounts, and to the rendition of such judgment. In the accounts presented were two items of cash received for tuitions and hay, to which the attention of the court was not specifically directed; and the defendant now claims that the judgment was erroneous because these items entered into the balance, and insists that it can avail itself of this error under the exceptions taken. But we think a consideration of this matter is forbidden by the rule which restricts this court to the review of questions raised below. It is clear that the county court assumed, and had a right to assume, the correctness of every item to which its attention was not particularly called. The right of the district to have these items excluded from the accounting was not asserted on the trial, and the question will not be considered here.

The county court found and certified the facts in regard to the Tinker claim, and "upon all the testimony in the case * * decided that the defendant district was not legally indebted" upon the order. The plaintiff insists that this was a finding of facts, and that consequently no question was saved by the defendant's exceptions. But the court found the facts to be as testified to by Mr. Tinker, and it appears from his testimony that the order was given him for his services as treasurer, and that it had not been paid.

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These facts having been found, it is clear that the court's further determination was a conclusion of law from all the facts in the case.

Upon the finding made, as above stated, it is to be considered that the order was legally issued. So the case presented is that of a just debt, barred by the statute of limitations. The running of the statute does not extinguish a debt, but prevents its collection if insisted upon. The right to plead the statute is a personal privilege, of which the debtor may avail himself or not as he chooses. *Smith* v. *Lincoln*, 54 Vt. 382; *Sanger* v. *Nightingale*, 122 U.S. 176. Doubtless the legislature might have transferred the rights of the old district to the town district in such a manner as to give the latter the same right to insist upon the statute. But it has not done this. The provision is that the indebtedness shall be paid by the district in the settlement of its pecuniary affairs. The adjustment by which the balance for transfer is to be determined is left in the hands of the old district. In making that adjustment the district could lawfully pay a just debt, although barred by the statute.

Judgment reversed, and judgment for plaintiff for $1561.98, with interest from January 1st, 1894.

J. B. HUSTED *vs.* ELLEN G. STONE and J. M. DEAN, trustee, apt.

October Term, 1896.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Trustee Process—Trustee under Will when Chargeable.

One who is chargeable by trustee process cannot deduct the amount of a note which he has merely endorsed for the principal debtor but has not paid nor assumed.

A trustee under a will is not chargeable by trustee process in an action

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against the beneficiary if he has not promised the beneficiary, nor been ordered by the probate court, to pay, nor in any way terminated the trust.

V. S. 1307 and 1365 considered.

GENERAL ASSUMPSIT. Heard on an agreed statement, in lieu of a disclosure, at the June Term, 1896, Addison County, *Rowell*, J., presiding. Judgment against the principal debtor in the justice court affirmed without costs and the trustee adjudged chargeable for the amount thereof. The trustee excepted.

The agreed statement contained the following clause: "If said four-hundred-dollar note is not allowed in offset, * * it is agreed that he has in his hands sufficient funds from the income of said estate to pay the plaintiff's judgment in excess of all sums due the trustee from said Ellen G. Stone * * provided said income is answerable to the trustee process."

F. L. Fish and *H. S. Peck* for the trustee.

The defendant could not have maintained an action against the trustee without first obtaining a decree against him in the probate court. The plaintiff can only take the defendant's place in this respect and must fail for the same reason. *Smith* v. *Stratton and Tr.*, 56 Vt. 362; *Kettle* v. *Harvey*, 21 Vt. 301; *Short* v. *Moore*, 10 Vt. 446; *Probate Court* v. *Chapin*, 31 Vt. 373; *Bank* v. *Kidder*, 20 Vt. 519; *Barker* v. *Esty*, 19 Vt. 131; *Adams* v. *Adams*, 16 Vt. 228; *Hoyt* v. *Swift*, 13 Vt. 129; *Hutchins* v. *Hawley*, 9 Vt. 295; *Hitchcock* v. *Egerton*, 8 Vt. 202; *Sargeant* v. *Leland*, 2 Vt. 280; V. S. 2511; *In re Hodges' Est.*, 63 Vt. 661.

If the trustee is otherwise chargeable the note upon which he is liable as endorser should be deducted. *Strong* v. *Mitchell*, 19 Vt. 644.

F. W. Tuttle for the plaintiff.

The note should not be deducted. The right of the trustee to retain claims in his favor extends only to existing absolute demands. *Noyes* v. *Hickcok*, 27 Vt. 36.

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The funds in the hands of the trustee are chargeable. V. S. 1307, 1308. There was no need of a decree of the probate court fixing the amount due to the defendant because the agreed statement fixes it. It is there stated that the funds due exceed the amount of the judgment against the principal defendant. *Hoyt* v. *Christie*, 51 Vt. 48.

TYLER, J. The plaintiff seeks to have said Dean adjudged chargeable in his individual capacity, on account of money received for the defendant by Dean in the performance of his duties as executor of the will of Electa Hazard, deceased.

The will was executed Sept. 10, 1874. The first and second bequests are not involved in this case. The third is as follows:

"I give and bequeath to my daughter, Ellen G. Stone, of Ferrisburgh, Addison County, Vt., the sum of three thousand dollars to be paid by my said executors within six months after my decease. I also give, devise and bequeath to my said daughter, Ellen G. Stone, all the real estate I now own in the town of Ferrisburgh, Addison County, Vt., *and also the use and income of the residue and remainder of my estate both real and personal during the life time of the said Ellen G. Stone.* At and after the decease of my said daughter, Ellen G. Stone, I do hereby give, devise and bequeath the said residue and remainder of all my estate, both real and personal, to be equally divided between such children of my daughter, Ellen G. Stone, as may live to be of legal age."

Joshua M. Dean and Rufus Hazard were named as executors, were appointed as such by the probate court upon the allowance of the will Jan. 19, 1875, and they distributed the estate according to the terms of the will, the defendant taking certain personal and real property.

The defendant also took possession of the real estate of which she was given the use and thereafter managed it and took the profits. The executors retained the personal property amounting to about ten thousand dollars, of which the defendant was given the income, and managed it

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until April, 1891, when Rufus Hazard died, after which Dean managed it, from time to time paid the income to the defendant as he received it, and rendered frequent accounts of his trust to the probate court.

That court has made no order giving the defendant the management of the personal property, and it has made no decree or order directing the executor to pay over any part of the income of the trust fund to the defendant.

The executor had in his hands, at the time of his disclosure, an amount of income derived from the trust fund sufficient to have paid the plaintiff's judgment against the defendant unless the executor was entitled to have deducted therefrom the amount of a four-hundred-dollar bank note which he had indorsed for her.

The foregoing facts were agreed upon for the purpose of the trial.

The trustee contends that he is not personally chargeable for the reasons that there had been no accounting in the probate court, and that no order of distribution had been made of such income prior to the disclosure.

(1) It is clear that the trustee was not entitled to deduct the amount of the note indorsed by him. He could only deduct demands against the defendant founded on contract expressed or implied. V. S. 1365. He had not paid nor assumed payment of the note, and his liability was only the usual liability of an indorser. *Strong* v. *Mitchell*, 19 Vt. 644.

(2) It is provided by V. S. 1307, that a debt or legacy due from an executor or administrator, and other goods, effects and credits in his hands, may be attached by trustee process; but it is held that an executor or administrator shall not be liable to be sued for the distributive share of an heir to the estate previous to any proceedings being had in the probate court in reference to fixing the amount of each heir's distributive portion of the estate. *Adams* v. *Adams*, 16 Vt. 228.

A decree of distribution is indispensable to any right of

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action as against the executor. *Short* v. *Moore*, 10 Vt. 446. When a decree has been made and the time fixed for payment has expired the amount decreed becomes a debt due from the trustee to the beneficiary. Until that time the fund belongs to the estate and the legal title is held by the trustee. *Bank* v. *Kidder*, 20 Vt. 519; *Probate Court* v. *Chapin*, 31 Vt, 373; *Foss, Tr.* v. *Sowles*, 62 Vt. 221; *In Re Hodges' Estate*, 63 Vt. 661.

The plaintiff contends that in the circumstances of this case the income was the defendant's so that she could have enforced its collection without an order of the probate court. The general rule is that, for a creditor of one to make another chargeable as trustee of the debtor, the latter must have a cause of action against the trustee,—that the creditor takes the place of the principal debtor. *Kettle* v. *Harvey*, 21 Vt. 301; *Boyden* v. *Ward*, 38 Vt. 628; *Smith* v. *Stratton and Tr.*, 56 Vt. 362.

It was held in *Lynde* v. *Davenport*, 57 Vt. 597, that an action at law would lie to recover the amount of a trust fund when the trust had terminated and nothing remained to be done but to pay over the money. Upon the same ground it was decided in *Underhill* v. *Morgan*, 33 Conn. 105, that a widow might maintain assumpsit against her husband's administrator for a fund which her husband had held in trust for her. In II Perry on Trusts, 843, it is laid down as a rule that where an account between the trustee and the *cestui que trust* has been stated, assumpsit will lie while the trust remains open, upon the ground that a legal debt had been created between the parties. So it has been held that where there is an express promise by the trustee to pay the beneficiary a certain part of the income, assumpsit will lie upon the promise. *Weston* v. *Barker*, 12 Johns. 276; *Dias* v. *Brunell*, 24 Wend. 9; *Roper* v. *Holland*, 3 A. & E. 99. In *Case* v. *Roberts*, Holt's N. P. Cas. 500, it is carefully stated that a balance of money received and to be accounted for by a trustee cannot be sued for at law by the party

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entitled unless such balance had been specifically adjusted, in which case it may be sued for.

The case at bar does not come within these rules. The trust had not terminated; the trustee had not promised to pay the beneficiary the amount of income in his hands, nor accounted to her for it so that a promise could be implied. No decree or order having been made the defendant was not entitled to sue for it. The case of *Hoyt* v. *Christie*, 51 Vt. 48, does not aid the plaintiff, for in that case the estate had been fully settled and the share of the defendant therein fully determined, and the money which constituted the defendant's share had ceased to be the money of the estate and had become the money of the defendant.

But the plaintiff contends that the trustee conceded his liability in the agreed statement. The concession was as to the amount of funds in his hands with a submission to the court of the question whether he was chargeable as trustee. The same question is now presented in respect to the trustee's legal liability that would have arisen upon the report of a commissioner.

Judgment reversed and judgment that the trustee is not chargeable.

CUTLER & MARTIN *vs.* HYNMAN SKEELS.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Evidence—Ordering Letter Produced—Opinion—Comparisons—Exception to Charge—Improper Argument to Jury.

Error cannot be predicated upon an improper answer to a proper question.

The exclusion of an unanswered question is not error, no offer being made showing that the answer would disclose admissible evidence.

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The trial court refused to order the plaintiff to produce, for the use of the defendant while cross-examining the plaintiff, a letter which the plaintiff had received from the defendant concerning the matter in question. *Held*, the contents of the letter not being shown by the record, that no error could be found in the ruling.

A witness qualified to speak upon the subject may give his opinion as to the age of cattle.

A dealer who had seen the meat in question was asked, as a witness, to compare the meat he saw with that which could be obtained from such cattle as were described by another witness. *Held*, that the question was properly excluded.

There was no error in allowing the defendant to be asked if in his letter to the plaintiff he stated his claim as he then, on trial, made it; no inquiry being made as to what the contents of the letter were.

An exception, to a recited portion of the charge, in the words, "to all which the defendant excepted," will not justify a reversal if any part of the recited portion is correct.

The court permitted counsel for the plaintiff to make, in argument to the jury, statements of facts which were not in evidence. In this respect there was error and the judgment is reversed.

GENERAL ASSUMPSIT. Plea, the general issue. Trial by jury at the March Term, 1895, Washington County, *Start*, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepted.

The action was for the price of a pair of oxen. The oxen, while alive, were sold, by description, through Howard P. Martin as the plaintiffs' agent, to be dressed and delivered at the defendant's market in Barre at seven cents per pound.

The defendant's evidence tended to show an express warranty that the oxen were not over five or six years old, a strictly fancy pair, and fit to hang in the defendant's windows as an advertisement, and that the price was for that reason larger by one cent per pound than the price of ordinary first-class beef; that the contract was made January 18, 1893, and that the cattle were delivered February 23, 1893, by one Lombard as the plaintiffs' agent; that the defendant received the meat with objections, not as filling the contract but in reliance upon Lombard's representation that the plaintiffs would do what was right about it; that until a month after the delivery the defendant supposed he

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was dealing with Howard P. Martin as principal; that the day after the delivery the defendant notified Howard P. Martin, by letter, that the meat was unsatisfactory and that he must come and settle, which letter was received and delivered to the plaintiffs on the day following; that after waiting a reasonable time and receiving no reply the defendant cut up the meat and began the sale of it, being still ignorant of the age of the cattle and not intending to accept it under the contract; that about March 1, 1893, the plaintiff Willard S. Martin called upon the defendant for the pay for the cattle and that the defendant insisted upon settling with the supposed principal, Howard P. Martin; that, soon after, Howard P. Martin called and was informed by the defendant that the meat was not accepted and that the defendant claimed damages for breach of the contract; that the cattle were, in fact, from twelve to fifteen years old, and the meat not worth over four or five cents per pound, and that considerable of it was unmarketable; that the defendant offered to return the unsold portion when he found that the plaintiffs were unwilling to allow a recoupment of damages. The plaintiffs conceded that they were bound by any representation made to the defendant by Howard P. Martin.

The plaintiffs' evidence tended to show that there was no warranty as to the age of the cattle, that they were not sold as a fancy article, and that the meat was all that it was represented to be.

(1) The basis for this exception appears in the opinion.

(2) On cross-examination, the plaintiff, Willard S. Martin, was asked if he did not instruct Lombard to keep quiet about where the oxen had gone, and answered: "No, I never did and I never heard of it until you just spoke." He was then asked: "You did not know that Mr. Lombard had told somebody that you had instructed him to that effect, did you?" The question was excluded and the defendant excepted.

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(3) On further cross-examination, the same witness admitted that while the case was pending before the justice he did, perhaps, ask him to look at other of the plaintiffs' cattle and see what kind of cattle they were. The defendant then offered to ask him: "Did you not know better than to approach a justice in that way?" The question was excluded and the defendant excepted.

(4) The basis for this exception appears in the opinion.

(5) The defendant while putting in his case called the plaintiff, Martin, for cross-examination and asked him to produce a letter written to the plaintiffs by the defendant, concerning the cattle, which the witness acknowledged was in court in the hands of his counsel. The court refused to order the letter produced at that time. The defendant excepted.

(6, 15½, 16) The witnesses Hall and Brock were allowed to give their opinion as to the age of the cattle, having testified that they had examined them for the purpose of determining their age.

(7, 8, 15) The basis for these exceptions appears in the opinion.

(17) Counsel for the plaintiffs in the opening argument stated to the jury that one of the witnesses for the defendant was an assistant counsel and argued that his relations as such counsel affected his credibility as a witness. There was no evidence in support of the assertion. The defendant was allowed an exception. In the closing argument the plaintiffs' counsel stated that the plaintiffs brought their reputation into court with them, that he (counsel) had known them for many years and known of their previous good character and reputation and that these were the best kind of evidence in their behalf. There was no evidence in support of either of these assertions. The statement was not withdrawn, but left to have its natural effect. The defendant was allowed an exception.

(18) The holding of the court renders a statement of the charge unnecessary.

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John W. Gordon for the defendant.

It was reversible error to permit the plaintiffs' counsel to make the recited statements of fact in argument to the jury. *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177, 195, 202; *Coble* v. *Coble*, 79 N. C. 589: 28 Am. Rep. 338; *Tucker* v. *Henniker*, 41 N. H. 317; *People* v. *Ah Len*, 92 Cal. 282: 27 Am. St. 103; *Cleveland Paper Co.* v. *Banks*, 15 Neb. 20: 48 Am. Rep. 334 and note; *Thompson* v. *State*, 43 Tex. 268; *Kennamon* v. *Kennamon*, 71 Ind. 417; *Hatch* v. *State*, 8 Tex. App. 416: 34 Am. Rep. 751; *State* v. *Fitzgerald*, 68 Vt. 125; *Bullard* v. *B. & M. R. Co.*, 64 N. H. 27: 10 Am. St. 367; *Rudd* v. *Rounds*, 64 Vt. 432.

W. A. Lord and *R. A. Hoar* for the plaintiffs.

If the statement of counsel in argument was improper, which we deny, objection should have been made at the time. If not so made it is too late. *State* v. *Ward*, 61 Vt. 153; *Com.* v. *Worcester*, 141 Mass. 58.

TAFT, J. (1) The plaintiff Martin in response to a question, testified that he gave Howard P. Martin instructions in regard to the sale of the cattle. No objection was made to the question, but in answering it he stated that he authorized him to sell them for seven cents a pound, and added, "that they were worth that, as he understood cattle were bringing that in Barre." It is insisted that the admission of this latter remark was error. It was not in response to the question.

That error cannot be predicated upon an improper answer to a proper question, see numerous Vermont cases. But the answer had some bearing upon the question of what instructions he gave Howard P. to sell them. It was more probable that he authorized him to sell them at that rate, if cattle were bringing the sum named, in the Barre market, than if the rate in that market had been less. But there was no controversy about the price agreed upon for the cattle, therefore the defendant was not harmed

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by the plaintiff's testimony that he understood cattle were bringing seven cents a pound in the Barre market, for that was the price at which the cattle were sold. For each of these reasons there was no error.

(2) Whether the plaintiff Martin had heard that Lombard had told somebody that he, Martin, had instructed him, Lombard, to keep quiet where the oxen had gone to, was immaterial. It was not pertinent to any issue in the case, and had no tendency to prove nor disprove any fact in controversy.

(3) The plaintiff Martin answered fully all questions asked in regard to what he had said to the justice about the latter looking at his, Martin's cattle, at the time this suit was pending before the justice. There was no error in excluding the question of whether he knew better than to approach the justice, and try to influence him, for it does not appear what his answer would have been. He may have answered "No," which would have been no benefit to the defendant. The defendant must show he has been harmed by a ruling, before a judgment should be reversed. The exclusion of an unanswered question is not error, an offer must be made showing that the answer would disclose admissible evidence.

(4) The plaintiff testified in respect to Mr. Lombard, "I engaged him to carry the meat over;" this testimony was not objected to. The court ruled that it was proper to show what the plaintiff engaged Lombard to do, but no further testimony was given under the ruling, and therefore no injury was caused by it. The correctness of the ruling is not considered.

(5) The defendant had written the plaintiffs a letter and during the trial called upon the plaintiffs to produce it. The letter was concerning the cattle. It is not shown what the contents of the letter were. The court ruled that, at the time, the defendant was not entitled to its production. The contents of the letter not being shown we cannot say that

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it was error to exclude it. Were the contents material we do not say it was an erroneous ruling. We are not called upon to consider the question.

(6, 15½, 16) When the witness Rice was testifying, the court ruled, he could not give his opinion as to the age of the ox,—but notwithstanding the ruling, he stated that as near as he could judge the ox was ten years old.

The defendant was not harmed by the ruling for the question he asked was answered. A witness qualified to speak upon the subject may give his opinion as to the age of cattle. There was no error in admitting the testimony of Hall and Brock.

(7) There was no error in excluding the testimony that the witness Rice, after the justice trial, told the plaintiff Cutler, the oxen were old; the defendant was permitted to show the age of the oxen, and that the plaintiffs had changed the ground upon which they claimed to recover.

The plaintiffs had conceded that they had inquired of the witness how old the oxen were, and the witness had stated at the trial how old they were. It will be inferred that the witness told the plaintiffs the age as he understood it to have been. It does not appear that the offer of the testimony was to show he told them it was different from what he stated on the trial that it was. We infer it was the same. The testimony in substance was already in the case and further examination of the witness was unnecessary.

(8) As tending to show what the plaintiffs knew, about the age of the oxen, at the time of the justice trial, statements made to the plaintiffs prior to the trial were admitted; but statements made to the plaintiffs after the justice suit, had no tendency to show that the plaintiffs knew the age of the oxen at the time of the trial, which was the purpose for which the testimony was offered.

(9, 10, 14) These points are waived.

(11, 15) A Mr. Rowell was called as a witness. He was a dealer in meats, and had seen the meats in question. He

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was asked to compare the meats with that which could be obtained from such cattle as were described by another witness. His comparisons were properly excluded. He could describe the meat in question and the jury could make the comparison, if it was material. For the same reason the question noted in the fifteenth exception was properly excluded.

(12) All that the defendant proposed to show by Mr. Bachelder under the twelfth exception, had already been conceded by the plaintiff Martin.

(13) There was no error in asking the defendant if in his letter he stated his claim of breach of contract, as he then, on trial, claimed it. No inquiry was made as to what the contents of the letter were.

(17) The counsel for plaintiffs in the opening and closing arguments, stated to the jury facts not supported by any evidence in the case.

The statement of counsel that he had known the plaintiffs for many years, and knew of their previous good character and reputation; and that their character and reputation was the best kind of evidence in their behalf, was not legitimate argument. It was a statement of facts that he had no right to make, and as it was permitted by the court, we regard it as an implied ruling, that such argument was legitimate.

In this respect there was error, for which the judgment must be reversed.

(18) The exception to that portion of the charge detailed in the bill, was taken in these words, "to all which" the defendant excepted. To sustain such an exception the whole charge as detailed must have been faulty. No question is made but that the charge as to a warranty, was correct. The exception must be overruled even if a part of the charge was incorrect. Whether it was faulty in some of its aspects we have no occasion to consider. This point has been decided so often, that it is needless to cite authorities in support of it.

Judgment reversed and cause remanded.

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THE PICTORIAL LEAGUE *vs.* HENRY J. NELSON,

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Parol Evidence to Vary Written Contract—Evidence of Similar Transactions.

The defendant signed a written order to the plaintiff to send him an advertising cut semi-monthly for one year, for which he agreed to pay a sum named. The margin of the order contained a statement, signed by the plaintiff that it would not be responsible for any agreement not appearing on the face of the contract. *Held*, that the order was a contract and subject to the ordinary rule excluding parol evidence.

It was error to permit the defendant to show that the agent, when taking the order, represented that the plaintiff would send ten cuts from which to make each selection and that this had not been done.

It was error to permit the defendant to show that the agent on the same day made similar representations to others in taking their orders.

GENERAL AND SPECIAL ASSUMPSIT. Plea, the general issue. Trial by court in the City Court of Burlington, October 3, 1896. Judgment for the defendant. The plaintiff excepted.

Powell & Powell for the plaintiff.

This is a written contract. Benj. Contr. 10, 11; *Daggett* v. *Johnson*, 49 Vt. 345.

The admission of parol evidence to prove an additional contemporaneous agreement by the agent was a plain violation of the settled rule. *Bradley* v. *Bentley*, 8 Vt. 243; *Gillett* v. *Ballou*, 29 Vt. 296; *Abbott* v. *Choate*, 47 Vt. 53; *Gates* v. *Moore*, 51 Vt. 222; *Benedict* v. *Cox*, 52 Vt. 247; *Morse* v. *Low*, 44 Vt. 561; *Dixon* v. *Blondin*, 58 Vt. 689; *Smith* v. *Burton*, 59 Vt. 408.

Testimony that the agent made a similar agreement with other purchasers was irrelevant. *Phelps* v. *Conant*, 30 Vt. 277; *Aiken* v. *Kennison*, 58 Vt. 665; Steph. Dig. Ev. 198, note VI; *Jones* v. *Ellis*, 68 Vt. 544.

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R. E. Brown for the defendant.

The order is not a contract. By reading it and inspecting the goods sent it could not be told whether the contract made by the agent had been complied with. The agent must have had authority to inform the defendant of the kind and quantity of the goods, and for this purpose he exhibited samples. It was proper to show what information the agent gave the defendant as to the quality of the goods and the opportunity that would be offered to order such as would be of value to him. This did not contradict the order. I Green. Ev. § 284 a; *Chapin* v. *Dobson*, 78 N. Y. 74; *Barclay* v. *Wainwright*, 86 Pa. 191; *Caley* v. *Phila., etc., R. Co.*, 80 Pa. 363; *Bradford* v. *Manly*, 13 Mass. 139; *Winn* v. *Chamberlin*, 32 Vt. 318; *Buzzell* v. *Willard*, 44 Vt. 44; *Edwards* v. *Golding*, 20 Vt. 30.

The defendant had no means of knowing what he was buying unless the plaintiff's manner of doing the business was, as represented by the agent, to forward "ten or more sample cuts" from which the defendant might select. The court found that this representation was made and relied upon but that the plaintiff's manner of doing business was not as represented. It was a case of fraud. The court found that the goods were not equal to the samples and this fact was decisive.

Evidence of similar fraudulent representations to other purchasers at about the same time was admissible.

ROSS, C. J. The action is to recover for cuts furnished in accordance with a written contract dated April 24, 1894, and for a breach of the contract by the defendant.

The contract is in the form of an order, and is as follows: "The Pictorial League," etc. "Gentlemen: Please furnish the undersigned with one cut and reading matter semimonthly to illustrate the Furniture and Draperies business in the City of Burlington, State of Vermont, only, for the term of one year from commencement, for which I agree to pay to your order at New York, the sum of one dollar and

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postage for each cut, at the end of the month," etc. This order was signed by the defendant. The order was procured by an agent of the plaintiff. On the margin of the order, was the following: "The holder of this blank is authorized to receive orders for the Pictorial League. The proprietors are not responsible for any agreements not appearing on the face of this contract." This was signed by the proprietors and agent. The plaintiff mailed the defendant four cuts which he refused to use, and directed them to cancel his order. This order is a written contract on the part of the defendant which could not be enlarged, varied nor contradicted by parol testimony of what transpired at the time of its execution. *Daggett* v. *Johnson*, 49 Vt. 345.

Against the plaintiff's exception, the defendant was allowed to give evidence tending to show that upon the occasion of giving the order, and before it was given, the agent represented that there would be sent by the plaintiff to the defendant, each time, before the cut was sent him, a sample sheet containing not less than ten samples, from which he could select one, and the cut for that sample would then be sent to him; that the plaintiff did not perform this representation of the agent but sent cuts which the defendant did not want, and which were inferior to the sample exhibited by the agent. This was error. It was allowing a further stipulation resting in parol, made contemporaneously, to be added to the written contract. The order does not specify the quality of the cuts to be furnished. If the plaintiff was, at the date of the contract, executing cuts of a specific quality only, whether it could furnish cuts of lower quality is not a question raised nor considered. If the plaintiff was then making cuts of different qualities, whether a latent ambiguity might not arise is not a question raised by the exceptions, nor considered.

Against the like exception of the plaintiff the defendant was permitted to show that the agent, on the same day, procured orders from persons in Burlington, engaged in

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other kinds of business, and made similar representations in regard to forwarding sample sheets. This was clearly error. The plaintiff had given notice by what was upon the margin of the order, that the agent was not authorized to bind it by any representations not embodied in the terms of the order. Hence neither the defendant nor the other persons from whom he procured similar orders, could treat the agent as authorized to make any representations, or stipulations, which would bind the plaintiff, unless the same were embraced in the written order. Moreover, the stipulations which a party may agree to in making a sale to other persons, has no necessary or legal tendency or relevancy, to show that he made the like stipulations in selling the like article to the defendant, although the sales were made nearly concurrently. This subject is fully considered in *Aiken* v. *Kennison*, 58 Vt. 665.

The defendant contends that these errors are rendered immaterial by the findings of the city court. This contention is not maintainable. From the statement in the exceptions, it appears, that the city court used this testimony, erroneously received, in making its findings, "that the representations were made by the plaintiff's agent, and that the defendant gave the order relying upon them, and that the plaintiff has never complied with the terms of the contract, and furnished such cuts as the defendant had a right to demand." This evidently means that the plaintiff did not furnish sample sheets as represented by the agent, and, therefore, the defendant had no opportunity to select the cuts. Hence the cuts furnished were not such as he had a right to demand.

Judgment reversed and cause remanded.

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VILLAGE OF WEST DERBY *vs.* NEWPORT CEMETERY ASSOCIATION.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Appeal in Chancery.

By force of V. S. 915, the court of chancery is always open, at least until the enrollment of the decree, for the purpose of filing a motion for an appeal.

BILL IN CHANCERY. Heard on a master's report at the September Term, 1896, Orleans County, before *Ross*, Chancellor, who decreed for the orators. The defendant moved for an appeal and the same was allowed. The orators moved to dismiss the appeal for want of jurisdiction.

The circumstances appear in the opinion.

E. A. Cook and *J. W. Redmond* for the orators.

This court has no jurisdiction. No appeal was taken in the manner provided by the statute. This appeal was not taken at the term. V. S. 981; *Gove* v. *Dyke*, 14 Vt. 561. The terms ends with the adjournment of the county court. The chancellor is not the court of chancery. *Sturgies* v. *Knapp*, 38 Vt. 540.

The defendant's contention is that the term continues until another term of the county court begins. But if this were so the appeal might be filed as well after the enrollment of the decree as before. The contention proves too much. The clerk is required to record the decree "after twenty days from the time a final decree is made, if no appeal is entered therefrom." V. S. 975.

John Young for the defendant.

The appeal is properly before this court. The statutory provisions are to be found in V. S. 914, 915, 941, 975, 981, 982.

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The court of chancery is always open for all purposes except the rendering of a final decree. The practical construction put upon the statute has been that an appeal might be taken at any time before the decree could be enrolled, i. e., within twenty days from the filing of the decretal order. *Morrill* v. *Kittredge*, 19 Vt. 529; *Brown* v. *Mead*, 16 Vt. 148.

TAFT, J. This cause was heard upon a motion to dismiss an appeal in chancery of a case heard at the September Term, 1896, in Orleans County.

The Orleans County Court adjourned on the 17th day of September. The cause was heard and a final decree entered by the Chancellor prior to the adjournment. Five days afterwards the defendant filed his motion for an appeal.

Section 981, V. S., provides that "a party may by a written motion filed at the term in which a final decree is made, appeal therefrom." The orator insists that the appeal was not taken at the term.

Section 915, V. S., provides that "For all purposes except the final hearing of a cause such court shall be always open for business."

We hold that one of the purposes for which the court is always open, at least until the enrollment of the decree, is the filing of a motion for an appeal and that in this case the appeal was regularly taken.

Whether one can be taken after a decree is recorded we need not consider, for in this case it was taken within twenty days from the time the final decree was made, and the decree could not be recorded until after the expiration of that time. This holding is in accord with the uniform practice which has long been followed in this State.

Motion to dismiss the appeal overruled, and cause continued.

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MARTIN J. McGOWAN *vs.* JOHN H. GRIFFIN et al.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

"Business" May Include Cash on Hand—Independent Covenants.

The plaintiff, by contract under seal, sold and transferred to the defendants his interest in a grocery business carried on by himself and one of the defendants, and the question arose whether money in hand and on deposit at the bank, realized from sales in the store and intended to be used in future purchases, passed. *Held*, that it did, in view of the circumstances attending the creation and conduct of the business and the previous relations of the parties.

The defendants, in the same instrument, covenanted to pay the plaintiff a stipulated sum. *Held*, that the plaintiff could recover upon the covenant though he had not turned over said funds, the remainder of the business having been transferred and accepted; and that the defendants could recoup their damages for the detention.

COVENANT BROKEN. Plea, the general issue with notice of special matter in defense and a tender. Trial by jury at the September Term, 1895, Washington County, *Thompson*, J., presiding. At the close of the testimony the court submitted special inquiries to the jury but directed a general verdict for the defendants. The plaintiff excepted.

The special inquiries and answers were as follows:

Question 1. "At the time of the execution and delivery of contract marked 'A,' were Martin J. McGowan and John P. McGowan partners in the grocery business?" *Answer*, "No."

Question 2. "At the time of the execution and delivery of said contract marked 'A,' did the plaintiff and defendants understand that it included and conveyed to the defendants the money on hand and on deposit in the bank, received from the business mentioned in said contract?" *Answer*, "No."

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The plaintiff's evidence tended to prove, and the defendants' to contradict, these findings.

John W. Gordon for the plaintiff.

The word, "business," did not include the cash on hand nor the deposit at the bank, as matter of law, and the jury found that the parties did not so understand it, as matter of fact.

The turning over of the money by the plaintiff, even if it was required by the contract, was not a condition precedent to the plaintiff's right to recover, and he was entitled to recover at least the balance due to him after deducting the amount of the money retained by him. *Plumb* v. *Niles*, 34 Vt. 230; *Taylor* v. *Gallup*, 8 Vt. 340; *Boone* v. *Eyre*, 1 H. Bl. 273 n.; *Stavers* v. *Curling*, 3 Bing. N. C. 355; *Tompkins* v. *Elliott*, 5 Wend. 496; *Foster* v. *Purdy*, 5 Met. 442.

R. A. Hoar and *S. C. Shurtleff* for the defendants.

The word, "business," included the cash and bank deposit as matter of law, as the court held.

The surrender of the money and deposit was a condition precedent to the plaintiff's right of recovery. II Green. Ev. § 235; *Lawrence* v. *Dole*, 11 Vt. 549; *Day* v. *Essex County Bank*, 13 Vt. 97.

Ross, C. J. The plaintiff insists that the court erroneously ordered a verdict in favor of the defendants.

(1) He says the contract under consideration should not be construed to cover the money taken by the plaintiff. By that contract the plaintiff sold and conveyed to the defendants "all his right, title and interest in and to the business heretofore carried on by him and John P. McGowan under the name and style of The Boston Branch Grocery store, and under the name of Martin J. McGowan, proprietor, at North Barre in the County of Washington." In another clause, he "transfers, conveys and assigns" to the defendants "all accounts due said firm," and in consideration thereof the defendants agree "to pay all debts and assume all

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obligations and liabilities contracted for and on behalf of said firm," and to pay the plaintiff a stipulated sum. Annie McGowan, the mother of the plaintiff, one of the defendants, "acknowledges full satisfaction and payment of all monies borrowed of her * * * for or on behalf of said business." This contract is under seal and is dated November 15, 1894. This contract is to be read and construed in the light of the circumstances surrounding the establishment and carrying on of the business and attending the making of the contract. These circumstances were, in substance, the following: In 1893, the plaintiff and his brother, John P. McGowan, were in Massachusetts working upon the railroad. John P's habits were not entirely good, and he did not save his earnings. Their mother, Annie McGowan, was desirous to have them engage in some other business. For that purpose she purchased a building in North Barre, the first story of which could be used for a grocery store, and the second story for a tenement. She induced the brothers to come there and go into the grocery business. She gave them the use of the building and furnished them, without interest, some fourteen hundred dollars to start the business with. The plaintiff had a wife and child. John P. was unmarried. The plaintiff furnished three hundred or three hundred and fifty dollars to put into the business. He borrowed of an aunt two hundred dollars which is a part of the debts contracted on behalf of the business which the defendants were to pay. The mother, the plaintiff and family, and John P. lived in the tenement over the store, out of the store. The plaintiff and John P. devoted their time to conducting the business. Neither of them received wages. On account of the habits of John P. the business was controlled mostly by the plaintiff, but there was an understanding that if John P's habits improved, he was to have an equal share in the business with the plaintiff. The business was thus started in the name of The Boston Branch Grocery store the first of April, 1894, and continued until the time of the sale.

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During the last part of the time, the plaintiff procured the printing of some bills headed, "The Boston Branch Grocery Store, Martin J. McGowan, proprietor." Money received from the business had been deposited in a bank, and this account was kept in the plaintiff's name, and he drew the checks to pay for purchases. John P's habits were not always what they should be.

About the first of November the relations of the brothers became unpleasant and John P. went to Massachusetts. His mother procured his return and procured her brother to come and to see if a settlement could not be brought about. After he came and had had some talk with the plaintiff about a settlement, on the evening of Saturday, the 10th of November, the plaintiff, as was his usual habit, took from the money drawer of the store nearly what money there was there and took it to his tenement. This money all came from the business of the store and was not returned. The plaintiff also had money on deposit in the bank coming from the same source. The parties do not agree in regard to what was said about this money during the negotiations, which resulted in the contract.

They agree that the negotiations which so resulted, were so far advanced that the defendants took possession of the store on Monday morning, November 12th, and continued in possession until the contract was signed. On November 14th the plaintiff drew most of the money out of the bank. Two or three forms of a contract were drawn, and finally the one which was executed on November 15th. Construed in the light of these surroundings, this money which the plaintiff took belonged to and was a part of the business done under the name of The Boston Branch Grocery Store, as much as the goods in the store. It came from the sale of such goods, and was intended to be used in purchasing goods for the store. It was a part of the capital which the mother and plaintiff had furnished to carry on the business. By conveying to the defendants all his interest in the business

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the plaintiff conveyed all his right, title and interest in and to this money, as fully as he did to the goods on hand, in the store. It is immaterial whether the plaintiff and his brother were in partnership. A grocery business had been created in the manner indicated, and it is not material to the construction to be placed on the contract, to determine the exact legal status of the business, and the rights of the several parties interested therein. It is not contended that it was not the duty of the court to construe the contract. It correctly construed it as conveying this money which came from the sale of goods from the store. It would be too narrow to construe the word, "business," to be the good will of the business, as contended by the counsel for the plaintiff. The good will of a business is not the business but is one result springing out of it. The circumstances do not raise any latent ambiguity, when the language of this contract is applied to the subject matter thereof. The special findings of the jury were both immaterial to the determination of the legal rights of the parties under the contract. But they were submitted by the court without exception, to determine points on which the parties were at variance in their testimony. The second finding is inconsistent with the general verdict ordered by the court. Whether against the plaintiff's motion to set aside the verdict, the court could reject this special finding, inconsistent with the general verdict ordered, we do not consider.

(2) The plaintiff further contends that the court erred in ordering a verdict for the defendants, for that, conceding that the money taken by the plaintiff from the business belonged, by the terms of the contract, to the defendants, the plaintiff was entitled to a judgment for the balance due him under the contract.

The action is covenant broken. The plea is that the indenture declared on is not the deed of the defendants. In their testimony the defendants concede that they executed the indenture. They also concede that they have received all

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the property conveyed except the money taken by the plaintiff which belonged to the business. Its amount is not determined. The defendants at one time offered to pay the plaintiff seventy-five dollars as the balance due him under the contract. The testimony does not show that they made him a tender of that sum of money; nor is a tender pleaded and brought into court. Neither has it been determined, if made and kept good as a tender, whether this sum is sufficient to pay the balance due the plaintiff.

This action of the court cannot be sustained on the ground that the defendants, before suit, had made, kept good, and brought into court for the plaintiff a tender sufficient to pay him the balance due under the contract. The exceptions state that the defendants offered to pay the plaintiff such a sum as should be found due him, if he would account for the money he had taken which belonged to the business at the time of the sale. This offer would not defeat the plaintiff from recovering such balance in this suit.

From the copy of the charge, it appears that the court made this ruling upon the ground that the plaintiff had refused to fulfill his part of the contract by claiming, in good faith, that the money belonging to the business which he had taken belonged to him and did not pass to the defendants by the contract. The covenants of the parties to the contract, were, in part, to be performed by them concurrently. The plaintiff was to surrender to the defendants all the property belonging to the business at the same time they were to pay the four hundred and seventy-five dollars. This sum was not the entire consideration for his covenant to surrender to them all the property and assets belonging to the business. They were also to pay and save him harmless from all debts and liabilities incurred on behalf of the business.

The plaintiff has surrendered to the defendants all the assets of the business except the money taken by him, and they still hold possession of the same. The withholding of

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this money was a breach of the plaintiff's covenant, but the damages arising therefrom were definitely ascertainable. It being a breach of his covenant in the same indenture on which he had brought his suit, the defendants could recoup the damages arising to them from his refusal to perform, from the contract price, to recover which the plaintiff brought the suit. The tendency of the decisions of this and other courts is to hold mutual covenants or stipulations, to be performed concurrently by parties to a contract, as independent rather than as dependent, and to allow a recovery by a party, who has partly but not fully performed, when the damages arising from his non-performance can be readily ascertained, and, by reduction or recoupment, taken from the amount he is entitled to receive by the terms of the contract for performance of his stipulation or covenant. This subject is fully considered in *Booth* v. *Tyson* 15 Vt. 515. After stating that modern decisions make an entire fulfilment requisite to a recovery applicable for the most part to contracts for labor, the doctrine of the decisions summarized and adopted is thus stated: "The principle of these cases seems to be, that, although the contract is in one sense entire, *i. e.* full performance on the part of the promisor is of the consideration of the contract, yet, if it contains, neither expressly, or by strong implication, a condition of full performance, precedent to any right to claim pay, and is of a uniform nature, and thus capable of just apportionment, the court will consider the promises independent and apportionable, and suffer a recovery for part performance, subject to the deduction of whatever damages the party, entitled to claim full performance, may have sustained." See also *Davenport* v. *Hubbard*, 46 Vt. 200. The rule thus stated is clearly applicable to this case. The plaintiff has performed a substantial part of his covenant in regard to the sale and delivery of the assets of the business. The defendants have not rescinded, nor offered to rescind, the contract because of his failure to fully perform, but hold the property delivered.

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His failure to refund the money which he took from the business, and the damages occasioned thereby are readily ascertainable, and can be adjusted in reduction of the sum to which the plaintiff is entitled by the defendants' covenant, so as fully to compensate the defendants for the plaintiff's failure fully to perform his covenant. Hence while the court correctly construed the contract, in suit, against the plaintiff, he was still entitled to recover so much of the stipulated price to be paid him as he should receive under the rule already stated, and the court erred in directing a verdict against him.

Judgment reversed and cause remanded.

C. E. BAGLEY *vs.* THOMAS MASON.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON. JJ.

Evidence—Complaints of Suffering—Offer in Presence of Jury—Examination of Plaintiff's Person—Argument.

It being competent to show that the defendant was intoxicated, as making it probable that he committed the assault, it was competent to show the degree of his intoxication by showing his boisterous and belligerent conduct when approaching the place where the affair occurred.

The plaintiff was properly allowed to show his symptoms and condition while suffering from another illness, five months later than the injury, in connection with evidence that the illness was aggravated by the injury, his right of recovery being correctly limited to the damages flowing from the defendant's act.

Evidence was properly received of complaints of bodily suffering made by the plaintiff to his attendant as well as to his physicians, and those made to the latter were not rendered incompetent by the fact that the physicians were consulted with a view to their becoming witnesses in this very suit.

The question whether the witness believed the plaintiff to be in pain on a certain occasion was properly excluded.

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No exception lies to the refusal of the court to require an offer of evidence to be made privately. Moreover the offer complained of, i. e., to show that the defendant had left the State and passed under assumed names to avoid arrest in this case, proposed evidence which should have been admitted as tending to contradict the defendant's claim of innocence.

There having been no suggestion on the part of the defendant that the plaintiff's person be examined in the presence of the jury until after the evidence was closed, the court was justified in refusing to permit it.

A certain argument of plaintiff's counsel to the jury was not justified, but being addressed to a point which the jury found in the defendant's favor, and not being prejudicial to the defendant on other issues, the refusal of the court to meet it by proper instructions was not reversible error.

TRESPASS for assault and battery. Plea, the general issue. Trial by jury at the June Term, 1896, Caledonia County, *Ross*, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff's evidence tended to show that on the 24th day of February, 1895, while he was lying upon a lounge at his boarding-place, the defendant, in a state of intoxication, struck him in the abdomen inflicting an injury which resulted in hernia; that he had suffered a general loss of health and had been unable to work.

Against the defendant's exception the plaintiff was permitted to show that in July, 1895, he was sick with a cold and a resulting fever, and that this illness aggravated the injury inflicted by the defendant; also that immediately after receiving the blow he complained to his attendant, not a physician, of being in great pain; and was permitted to show the complaints made by him to physicians whom he consulted and by whom he was treated, while contemplating this suit with the understanding on his and their part that they would be used as witnesses therein.

A witness for the plaintiff had testified that the plaintiff, though complaining of a cold just before the assault, did not then appear to be suffering greatly. On cross-examination defendant's counsel was refused permission to ask the witness if, at the time, he believed from the plaintiff's appearance that he was in pain. To this refusal the defendant excepted.

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Bates & May for the defendant.

There was error in admitting evidence of the plaintiff's illness in July.

The plaintiff should not have been permitted to show acts of drunkenness on the part of the defendant not in the presence of the plaintiff. The fact that the defendant was intoxicated might be shown but not what he did elsewhere.

The defendant had a right to ask the plaintiff's witness whether he believed the plaintiff was suffering when the witness was helping him for a cold just before the assault. The defendant claimed that the plaintiff was suffering from that trouble and that he was not injured by the defendant. *Bruce* v. *Bishop*, 43 Vt. 161; *Stacy* v. *Portland Publishing Co.*, 68 Me. 279.

The physicians should not have been permitted to testify to complaints made to them as proposed witnesses. Such complaints to be admissible must have been made at a time when the conditions afford a presumption that the complaints were true. *Hadley* v. *Howe*, 46 Vt. 142; *In Re Hurlburt's Est.*, 68 Vt. 366; I Green. Ev. § 102; *Grand Rapids & Ind. R. Co.* v. *Huntley*, 38 Mich. 537.

The judgment should be reversed for the misconduct of plaintiff's counsel as shown by the exceptions. The question asked and withdrawn, the remark that the jury could draw the inference themselves, and the offer to show that the defendant had passed under assumed names to avoid service, were all flagrant breaches of professional propriety. *Scripps* v. *Reilly*, 35 Mich. 371: 24 Am. Rep. 575; *Walker* v. *Coleman*, 55 Kan. 381: 49 Am. St. 254; *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177.

It was error to neglect to instruct the jury that the debts proved in the court of insolvency were presumed to be honest.

W. P. Stafford for the plaintiff.

MUNSON, J. The plaintiff claimed that the defendant

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struck him in the abdomen while he was lying upon a lounge. The defendant denied the striking. The plaintiff introduced testimony to show that the defendant was intoxicated, and included therein evidence of what the defendant did before he came into the plaintiff's presence. It is insisted that this evidence should have been confined to a direct statement of the witness as to the defendant's condition. But we think the same reason which permits proof of intoxication as bearing upon the probability of an assault will permit proof of the extent and effect of that intoxication to increase the degree of the probability. This cannot always be effectively presented without some descriptive testimony. We think it was proper to show the boisterous and belligerent conduct of the defendant just before the alleged assault and while he was approaching the place of it, and that in doing this it was permissible for the witness to state that the defendant collared him as he passed through the room.

The testimony of the physicians as to the plaintiff's condition in July when suffering from a cold and resulting fever, was properly received. It was competent as tending to show that the injury complained of was of such a nature and severity that it was aggravated by other indispositions. The situation of the case as affected by this testimony was properly brought to the attention of the jury. They were distinctly told that they were to compensate the plaintiff only for the suffering and loss occasioned by the defendant's act.

The testimony as to the complaints of bodily suffering made by the plaintiff to his physicians was properly received. Evidence of those made to an attendant not a physician, was also admissible. Green. Ev. § 102. Nor was it error to receive testimony as to such complaints made when the suit was in contemplation. *Kent* v. *Lincoln*, 32 Vt. 591. The question whether the witness believed the plaintiff was in pain was properly excluded. It might have

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been proper to ask him whether the plaintiff appeared to be feigning. His opinion was proper only so far as it was necessarily included in the presentation as it appeared to him of something which could not be otherwise described. It was not a matter of belief, but of description.

It was proper for the plaintiff to show what daily wages he earned before and after the injury, and the time he was unable to work because of it. As the wages he received both before and after were independent of board, the amount he paid for board while unable to work was not necessary to the ascertainment of his damages; but it cannot, under correct instructions, have been used to the defendant's injury.

The defendant excepted to the action of the court in permitting plaintiff's counsel to make in the hearing of the jury an offer to show by a cross-examination of the defendant that he left the State early in May and afterwards remained out of it, passing under assumed names, for the purpose of avoiding arrest in this suit. A party is not entitled as of right to have an offer made privately to the court. Moreover, this offer embraced nothing inadmissible. The defendant having denied that he made the assault, the plaintiff might properly be permitted to discredit his testimony by showing a course of conduct inconsistent with his claim of innocence. It appears that the defendant then testified upon inquiry to his leaving the State and going to different places. In a previous cross-examination of one of defendant's witnesses, plaintiff's counsel asked him if the defendant stopped with him the night he ran away, and upon an exception being taken withdrew the question. The asking of the question may have been improper; but in view of the plaintiff's right to inquire into that matter, and of what subsequently came into the case, it cannot be considered an adequate ground for reversal.

There having been no suggestion on the part of the defendant that the plaintiff's person be examined in the

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presence of the jury until after the evidence was closed, the court was perfectly justified in refusing to permit it at that time.

The defendant introduced a book, produced by the plaintiff on cross-examination, in which plaintiff had made daily charges of his lost time to the defendant. In re-examination plaintiff's counsel asked him if he made the charges with an idea that the defendant would probably have to pay them, and on objection being made withdrew the question, with the remark that he presumed the jury could draw the inference themselves. An exception was taken to this remark. If the remark was a suggestion to the jury to infer something from the question asked and abandoned, it was highly improper. But if it meant that the jury could draw the inference from the charges alone without explanation, it was objectionable, if at all, merely as an argument out of time. The latter seems to us to be the evident meaning.

No exemplary damages were allowed. The defendant, as bearing upon the claim for exemplary damages, showed the amount of the debts proved against his estate in insolvency; and the plaintiff then put in the list of his debts, from which it appeared that two of them were owing to his brothers. Plaintiff's counsel claimed in argument that there was a strong suspicion that these family debts were fraudulent, and the defendant excepted to the refusal of the court to give the jury any instruction upon this point. The argument was not justified, but it was addressed to evidence admitted solely upon a question which the jury found in favor of the defendant, and from a consideration of the whole case we are satisfied that it cannot have prejudiced him upon the issues found against him.

Judgment affirmed.

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McNeal Pipe and Foundry Co. *vs.* Inman Bros., trustee and claimant.

October Term, 1896.

Present: Rowell, Tyler, Munson, Start and Thompson, JJ.

Trustee Process.

The defendants contracted with the trustee, the City of Rutland, to lay its water pipes, and, lacking means, induced one Foote to advance them for a share in the profits under an agreement that the defendants and Foote should become incorporated and the contract be transferred to the corporation. The defendants and Foote proceeded with the work as partners until the corporation was formed, when the contract was transferred as agreed. *Held*, that the trustee never became indebted to the defendants alone, but to them and Foote jointly or to the corporation, and was, therefore, not chargeable, regardless of any notice to it of the assignment.

General Assumpsit. Heard upon the report of a commissioner at the March term, 1896, Rutland County, *Taft*, J., presiding. Judgment that the trustee be discharged. The plaintiff excepted.

Edward Dana for the plaintiff.

The contract was between the trustee and the defendants, the work was performed by the defendants and the pay was due to them. There was no notice of any assignment.

Frank D. White and *Henry L. Clark* for the claimant.

While the contract was taken in the name of the defendants they were really agents of the claimant by whom the work was entirely performed. The debt was due to the claimant, not to the defendants. *Bartlett* v. *Woodward*, 46 Vt. 100; *Davis* v. *Willey*, 57 Vt. 125; *Carr* v. *Sevene*, 47 Vt. 574; *Smith* v. *Foster*, 36 Vt. 705.

Rowell, J. The defendants contracted with the city of Rutland, the trustee, for laying water-pipe. They had not sufficient means to enable them to perform the contract, but

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expected to obtain means as they subsequently did, but the city did not know it. After the contract was made, but before work was begun under it, they induced Mr. Foote to join them in the undertaking, and to advance the necessary means, on certain terms as to sharing in the profits. To that end the defendants and Foote agreed to organize a corporation consisting of themselves, to be called the Inman Brothers Construction Company, with a capital of $75,000, of which the defendants were to put in $50,000 in tools, machinery, etc., and the good will of their business, including the contract with the city and other contracts, and Foote was to put in $25,000 in cash, for which he was to be secured by the capital stock of the corporation and the control of its finances; and he paid in that amount accordingly from time to time, commencing before the work began.

Although the contemplated corporation was not formed for some time, yet immediately upon the making of said last-mentioned agreement, the defendants and Foote began to act as partners under the proposed corporate name, and continued so to act until the organization of the corporation a short time before the work in question was completed, when they transferred all the business to it, including the contract with the city.

The funds thus contributed by Foote and the remittances received from New York in the name of the Construction Company, were used to pay for labor and materials in performing the contract, and without such contribution and remittances the contract could not have been performed.

Although the contract was originally between the defendants and the city, yet it was wholly performed by the defendants and Foote as partners and by the corporation, of which they were the sole members. Consequently the entire indebtedness of the city for the performance of the contract belongs to them or to the corporation, and cannot be attached by trustee process as the property of the defend-

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ants. The city never became indebted to the defendants alone, but to them and Foote jointly, or to the corporation, and they or it could maintain an action against the city in their or its name. This being so, it is unnecessary to inquire as to the sufficiency of the notice of assignment, for no notice was necessary. This holding is fully sustained by *Bartlett* v. *Woodward*, 46 Vt. 100, one phase of which is almost precisely like this case.

Judgment affirmed.

M. N. BURNHAM *vs.* M. P. COURSER.

October Term, 1896.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Statute of Limitations—Burden of Proof as to Known Attachable Property.

One who seeks to avail himself of the statute of limitations is bound to prove that he had known attachable property within the State for the statutory period, if he has not been for the same period present or resident therein.

The defendant pleaded the statute of limitations. The plaintiff replied the defendant's absence from and residence without the State with no known attachable property therein. The defendant rejoined with a traverse. *Held*, that the issue of known attachable property was not raised, since that could be done only by an affirmative averment on the part of the defendant, which would cast upon him the burden of proving the same.

ASSUMPSIT on a promissory note. Pleas, the general issue and statute of limitations. Replication to the plea of the statute, absence from and residence out of the State with no known attachable property therein. Rejoinder, traverse. Trial by jury, December Term, 1895, Windsor County,

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Rowell, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The only question was whether the action was barred by the statute of limitations. The defendant introduced no testimony but rested when the plaintiff did, and moved for a verdict, which was denied, and he excepted.

There was evidence that the defendant took a lease of a hotel in Hartford, Vermont, in 1894, and that the scrivener stated his residence therein as of Sunapee, New Hampshire, upon information then derived from the defendant.

William Batchelder for the defendant.

The court should have granted the defendant's motion for a verdict. The evidence did not tend to establish absence and non-residence for the requisite period.

The burden was upon the plaintiff to show that the defendant had no known attachable property within the State. *Batchelder* v. *Barber*, 67 Vt. 254; *Stevens* v. *Fisher*, 30 Vt. 200.

It is true that the contrary was held in *Rixford* v. *Miller*, 49 Vt. 326, but that case depends upon *Mazozon* v. *Foot*, 1 Aik. 282, wherein the point was raised only inferentially, and *Hill* v. *Bellows*, 15 Vt. 727, which gives no reason and cites no authority.

The issue as to property is made by the replication following, and necessarily following, the language of the statute. V. S. 1211.

The court has held that the plaintiff must prove both absence and non-residence. The reason is equally strong for requiring him to prove the absence of property. *Mazozon* v. *Foot*, I Aik. 282.

Hunton & Stickney for the plaintiff.

The subject matter of the negative averment in regard to property lies peculiarly within the knowledge of the defendant; the averment is therefore to be taken as true unless disproved by the defendant. *State* v. *Lipscomb*, 52 Mo. 32;

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State v. *Crowell*, 25 Me. 171; *Rex* v. *Turner*, 5 M. & S. 206, 211, 213; *Rex* v. *Burdett*, 4 B. & Ald. 95, 140; *Hill* v. *Bellows*, 15 Vt. 727, 733; *Wheeler* v. *Brewer*, 20 Vt. 113; *Rixford* v. *Miller*, 49 Vt. 319.

The charge of the court upon the burden of proof is supported by *Rixford* v. *Miller*, 49 Vt. 319, and, though contradicted in language by *Batchelder* v. *Barber*, 67 Vt. 254, and *Stevens* v. *Fisher*, 30 Vt. 200, is not in conflict with the actual decision in either of those cases.

Ross, C. J. The only contention is whether the action, on the note in suit, is barred by the statute of limitations. To this plea the plaintiff replied, absence from and residence out of the State, with no known property within it. Rejoinder, a traverse. The note is payable on demand, and dated May 19, 1868. Immediately upon giving it the defendant removed from and resided out of the State until about 1880. About that time he came to Barton and kept a hotel about a year. The defendant introduced no testimony.

(1) He insists that the plaintiff's testimony had no tendency to show that, after he ceased to keep hotel at Barton, the defendant was absent from and resided out of the State. The testimony of Newcombe was, in substance, that the defendant told him that he had been keeping hotel seventeen or eighteen years, that he was at Barton about a year, and that all the other places where he kept hotel, and where he spent his summers, were out of the State. This had a tendency to show that the defendant, during these years, was present where he was carrying on business, where he said he spent his summers, that he resided at the places named, and therefore was absent from and resided out of the State, except while at Barton. Hence, the court committed no error in submitting this testimony to the jury as tending to establish the two facts of absence from and residence out of the State. Nor did the court err in its instructions to the jury, that the statement in the lease which the defendant in 1894 took of the hotel at White

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River Junction, in regard to his then residence, might be considered as tending to show where his residence was at that time. It was a declaration, presumably of the defendant, in regard to his then residence.

(2) While the plaintiff gave some testimony, tending to show that the defendant left no known attachable property in the State, the court, against the exception of the defendant, held and charged that if "when he got through keeping hotel at Barton, the defendant removed from the State and was thereafter absent therefrom and non-resident therein, until he came to White River Junction, the plaintiff was entitled to recover, as, in that case, the burden would be on the defendant to show that he had the requisite property in the State, which he had not attempted to do." This holding is directly sustained by the decisions of this court in *Hill* v. *Bellows*, 15 Vt. 727, and in *Rixford* v. *Miller*, 49 Vt. 326, in each of which the identical question was raised and decided. It is in substance so held in *Mazozon* v. *Foot*, 1 Aik. 282. The defendant contends that this court held in *Stevens* v. *Fisher*, 30 Vt. 200, and in *Batchelder* v. *Barber*, 67 Vt. 254, that the burden to prove that the defendant at the time the cause of action accrues, "is absent from and resides out of the State and has not known property within the State which can by common process of law be attached," rests upon the plaintiff to prevent the statute running. Some of the language used, apparently, supports this contention. But in neither was the precise question raised, nor considered. In *Stevens* v. *Fisher*, the defendant pleaded that the plaintiff's cause of action did not accrue within eight years next before the commencement of the suit. The plaintiff replied that the defendant was out of the State, before and at the time the cause of action accrued, that he first returned at a specified date, and that he brought his action within eight years thereafter. He did not reply that during that time the defendant also resided out of the State, nor that he had no known attachable property in it. The plaintiff proved

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that during the time covered by the replication, the defendant resided in the state of New York. After stating that to prevent the running of the statute, two facts must concur—absence from the State, and that the defendant had no known attachable property within the State—the court remarked: "The replication is, we think, entirely defective, and the plaintiff's proof is equally defective in bringing the defendant within any of the exceptions of the statute." This does not touch the question upon whom the burden rested to prove the non-existence or existence of known attachable property, if the plaintiff had both alleged and proved absence from and residence out of the State. Clearly the plaintiff's replication and proof were both defective. He had alleged absence from the State and proved residence out of it. If he had proved his absence from the State, service of the plaintiff's writ might have been made upon him at the defendant's residence. Proving that the defendant resided in New York did not sustain his replication, nor did it exclude that the defendant was present in the State, so that the plaintiff could not have served his writ upon him. The point is not raised, nor considered, which is now before us for consideration, nor is there any intimation what the court would have held if it had been presented. The cases in 1 Aiken and in 15 Vt., are not alluded to. *Batchelder* v. *Barber*, *supra*, was heard on a referee's report. The action is assumpsit, plea, non-assumpsit with notice of the statute of limitations. What facts were reported is not disclosed. The attorney for the defendant cited *Stevens* v. *Fisher*, in support of the proposition that the burden was on the plaintiff to establish that the defendant had no known attachable property in the State while he was absent from it. The opinion apparently endorses this contention and cites *Stevens* v. *Fisher*, as supporting it. No other case is cited by the counsel, nor by the court, and apparently no other case was considered. If the facts reported by the referee brought the case within

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the decision in *Stevens* v. *Fisher*,—as we must presume they did—the case was correctly decided. Such decision would not require any statement in regard to the party upon whom the burden rested to show *known property subject to attachment in the State*, provided the plaintiff established the defendant's absence from and residence out of the State for a sufficient length of time to prevent the running of the statute of limitation. It is evident that this court by its decisions in *Stevens* v. *Fisher* and in *Batchelder* v. *Barber*, did not intend to overrule the decisions in 1 Aik. 15 Vt. and 49 Vt. above cited. The practice so far as disclosed by the decisions, has conformed to the decisions in the 15 Vt. and 49 Vt. In *Tucker* v. *Wells*, 12 Vt. 240, the court, in remarking upon the replication, says, that if the defendant had taken issue thereon, "it would have been incumbent on the defendant to have proved that the plaintiff in fact had knowledge of the existence of the property." In *Wheeler* v. *Brewer*, 20 Vt. 113, in *Russ* v. *Fay*, 29 Vt. 381, and in *Moore* v. *Quint*, 44 Vt. 98, from the statement in regard to the order of the trial, it is implied that the defendant assumed the burden of proving that he had known attachable property in the State. We think the decisions in *Hill* v. *Bellows* and *Rixford* v. *Miller* are well supported on principle.

The statute of limitations is one of rest from litigation. It does not assume that the debt in suit has been paid, but rests upon the principle that the plaintiff shall have a certain time in which to enforce its payment, and that if he neglects to take steps during such period to enforce it he shall no longer be entitled to that right. It is a bar of the right created by statute. The debtor must both plead and establish it. The statute proceeds upon the assumption that, during the statutory period, the debtor is so circumstanced that his creditor can take steps to enforce collection of his debt, either by a judgment personally binding the defendant, or by a qualified judgment against his property

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within the jurisdiction. To effectuate these purposes, the statute limits a period in which different forms of action shall be brought. In assumpsit, the form of this action, the time limited is six years after the cause of action accrues. The periods limited, applicable to the different forms, or causes of action, are stated in separate sections of the statute. Then, in a different section of the statute, V. S. 1211, there is a general provision,—applicable to the several preceding sections, limiting the times in which different forms of action shall be brought,—for a deduction from the time limited, under certain conditions. This provision, applicable to this action, is, "if, after a cause of action accrues and before the statute has run, the person against whom it accrues is absent from and resides out of the State, and has not known attachable property within the State which can by common process of law be attached, the time of his absence shall not be taken as a part of the time limited for the commencement of the action." This provision for a deduction from the time limited for bringing the different form of actions, being general, contained in another section of the statute, and applicable alike to several preceding sections of the statute, need not be incorporated by the defendant into his plea in bar. His plea, non-assumpsit *infra sex annos* is sufficient. If either his declaration, specifications, or proof brings the plaintiff's case within the operation of the plea, and he relies upon the deduction from the time limited provided for in V. S. 1211, the plaintiff must reply *precludi non*, because, etc., defendant was absent from and resided out of the State and had not known property within the State, etc. He must include in his replication all these provisions of the statute which create the deduction, although that relating to known property is a negative averment, made so by the statute. If the defendant should deem it material to the maintenance of his plea in bar, to make an issue upon whether he had known attachable property within the State, he cannot do

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so, because it is a negative averment in the replication, by a traverse, but, by rejoinder, must aver, affirmatively, that during the time embraced in the replication he had known attachable property in the State, and conclude with a verification. I Chitty Pl. 613; *Martin* v. *Smith*, 6 East. 554; Story's Pl. in Civil Actions pp. 138, 139; *Mazozon* v. *Foot*, 1 Aik. 282; *Sissons* v. *Bicknell*, 6 N. H. 557. Having so rejoined, the plaintiff, by surrejoinder, may traverse this fact, and thereby the burden falls upon the defendant to establish that during the time covered by the replication he had known attachable property within the State. This was the order of pleadings pursued in *Sissons* v. *Bicknell*, *supra*, and the court held that the burden was on the defendant to show that he had known attachable property in the State. *Mazozon* v. *Foot*, *supra*, arose on another provision of V. S. 1211, reading, "If, when a cause of action of a personal nature * * * accrues against a person, he is out of the State, the action may be commenced within the time limited therefor after such person comes into the State." To the plea setting up the statute, the plaintiff replied, that the defendant was out of the State; rejoinder, that defendant came and returned within the State, etc. Surrejoinder, traversing the last plea of the defendant. It was held that the burden was on the defendant to show that his return into the State was known to the plaintiff, and was for such length of time, that he could have made service of his writ upon him, unless his return was permanent and became a residence in the State. *Hill* v. *Bellows*, 15 Vt. 727, was an action of book account. The defendant pleaded the statute of limitations. The plaintiff replied as in the case at bar. The defendant traversed the replication as in the case at bar. It is said in disposing of the case, "It is questionable whether this clause of the statute,"—the one reading, "and has not known property" etc.—"has any application whatever to the case under consideration, inasmuch as it is found that the defendant resided and was out of the State at the

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time the cause of action accrued." This intimation must have been on the basis that defendant's traverse of the replication only put in issue, the affirmative averments of residence out of and absence from the State, contained in the replication, but did not put in issue the negative averment therein that the defendant "has not known property" etc. The court further says, "If it has any application, it was incumbent on the defendant, if he intended to avail himself of its provisions, to prove that he had known and visible property within the State from which the plaintiff could have satisfied his demand, by attachment and levy of an execution." This case is identical with the case at bar, both in the form of pleadings, and in the holdings of the court.

Rixford v. *Miller*, 49 Vt. 319, is an action of book account. The pleadings in the case are not set forth in detail. It is stated that the defendant claimed, "that as the cause of action accrued more than six years before suit was brought, and as the plaintiff had not shown that the case came within the provisions of § 15, c. 63 Gen. St. (V. S. 1211) it was barred by the statute of limitations." This objection was unsustained, and the case decided on the doctrine of *Mazozon* v. *Foot* and *Hill* v. *Bellows*. Hence, on the authority of these decisions and on principle, the ruling of the trial court was correct. While the statute required that the plaintiff, in his replication, should include the negative averment, that defendant during his absence from and residence out of the State had not known attachable property in the State, this negative averment was not traversable, nor put in issue by the defendant's traverse of the replication; that to have made the subject of known attachable property regularly available to the defendant, in support of his plea, he should have rejoined avering affirmatively, such known attachable property. This order of pleading places the burden of proving that he had known attachable property on the defendant, and if he did not

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follow it, he could ask for no more, on a traverse of the replication, than that he should be allowed—as was questioningly done in *Hill* v. *Bellows*—the benefit of it, if he proved it.

This result is confirmed by text writers on the subject of burden of proof.

Mr. Greenleaf says: "The obligation of proving any facts lies upon the party who substantially asserts the affirmative of the issue." I Green. Ev. § 74, Mr. Starkie gives substantially the same rule. I Starkie on Ev. 376. Both say that the cases in which the plaintiff grounds his right of action upon a negative allegation are an exception to this rule. I Green. Ev. § 78; I Starkie on Ev. 377, 378. An examination of the cases, given by these authors, as constituting the exception, shows that unless the negative on which he grounds his right of action is established by the plaintiff, the law presumes against the existence of the negative. The test determinative of upon whom the burden of proving a given fact rests, is whether, if the fact is not established, it will be fatal to such party's right to recover. II Am. & Eng. Ency. Law 655. This rule and exception thus tested, are, in legal effect, the rule expressed in Art. 93 of Stephens Digest of Evidence, thus, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts, or denies, must prove that those facts do or do not exist." In the case under consideration, the plaintiff establishes his right to recover, if nothing more is shown, on producing the defendant's promissory note uncancelled. The defendant says, by his plea, that the plaintiff has become barred from exercising this right because more than six years elapsed after the right accrued before he brought his suit. The plaintiff rejoins *precludi non*, because the defendant was absent from and resident out of the State and had not known attachable property in the State. If the plaintiff establishes that the defendant was so absent from and resident out of the State,

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there is no presumption that he had known attachable property within the State during the time of his absence from and residence out of it, but the existence of such property within the State during the time of his absence from and residence out of it is a fact which must be in the case to establish the defendant's plea in bar. Hence the burden is upon him to establish this fact, if judgment is to be rendered in his favor. With this fact not brought into the case, the defendant's plea in bar fails, and the plaintiff is entitled to recover on his note.

Judgment affirmed.

ALONZO STARKEY *vs.* FRED M. WAITE.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Replevin—Effect of Verdict for Plaintiff.

A verdict in replevin that the defendant is guilty, and a judgment thereon, without mention of damages or costs, establishes the plaintiff's right of possession and the defendant's wrongful taking and detention, and, by consequence, the plaintiff's right to at least nominal damages; and the clerk is justified in issuing an execution for such damages and costs, and if damages be omitted, the execution will not for that reason be set aside on *audita querela.*

AUDITA QUERELA to set aside an execution issued on a judgment of the Supreme Court for Windham County. The facts are stated in the opinion.

Clarke C. Fitts for the petitioner.

No express judgment for costs was rendered in either the county or supreme court. Hence, the question is, whether costs are incident to such a judgment as was rendered.

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Even though costs in the supreme court were recoverable, yet the petition is well grounded since the execution covers the costs in both courts.

Replevin sounds in damages. If none are awarded the plaintiff by verdict or judgment he is not a "recovering party" within the meaning of the statute, and therefore is not entitled to costs. V. S. 1481, 1675, 5389; *Tyler* v. *Frost*, 48 Vt. 486; Cobbey, Replevin §§ 1149, 1054, 1074, 1075; *Stevens* v. *Briggs*, 14 Vt. 44.

The verdict of guilty would not necessarily carry with it even nominal damages. Cobbey, Replevin § 1853.

Waterman, Martin & Hitt for the defendant.

Audita querela cannot be maintained. *Lamson* v. *Bradley*, 42 Vt. 165.

The judgment of the county court having been affirmed in the supreme court cannot be disturbed on this petition. *Staniford* v. *Barry*, 1 Aik. 321; *Perry* v. *Morse*, 57 Vt. 509; *Griswold* v. *Rutland*, 23 Vt. 324; *Johnson* v. *Roberts*, 58 Vt. 599.

The statute in terms gives costs to the plaintiff in replevin if he prevails. If no proof of damages be made he is entitled to nominal damages. V. S. 1481. The judgment of the county court having been affirmed, the plaintiff was entitled to costs in the supreme court by force of the statute. V. S. 1632, 5389, 2596; *Bliss* v. *Little's Estate*, 64 Vt. 133.

The petitioner has no standing on *audita querela*, never having offered to pay that part of the execution which is not in question. *Johnson* v. *Roberts*, 58 Vt. 599; *Dodge* v. *Hubbell*, 1 Vt. 491; *Clough* v. *Brown*, 38 Vt. 179; *Rickard* v. *Fisk*, 66 Vt. 675.

Ross, C. J. This is *audita querela* to have an execution set aside, issued on a judgment, rendered by this court, at its January Term, 1896, in favor of the defendant against the plaintiff. In that action, the defendant caused to be replevied, a horse, on the claim that it was exempt from

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attachment, which the plaintiff, as deputy sheriff, had attached on a writ in favor of a creditor of the defendant. The replevin suit was tried in the county court, by the jury, who returned a verdict,' "That the defendant is guilty in manner and form as the plaintiff in his declaration has alleged." On this verdict, a general judgment was rendered by the county court, in favor of this defendant. In terms, the judgment did not mention damages, nor costs, nor did the verdict, on which it was founded. This plaintiff brought the case to this court on exceptions, which are immaterial to questions now raised. In this court, the judgment of the county court was affirmed. When the clerk of this and the county court came to tax the costs, he included this defendant's costs not only in this court but in the county court, and included no damages, not even nominal damages. The plaintiff concedes that under the decision in *Bliss* v. *Little's Est.*, 64 Vt. 133, costs in this court were properly taxed in favor of the defendant, but contends, that, inasmuch as the jury returned no specific finding of damages, and the county court, in its judgment, made no mention of damages nor costs, the costs in that court were illegally and wrongfully taxed. In *Stevens* v. *Briggs*, 14 Vt. 44, it is held that the recovery of costs by a plaintiff are consequent upon his recovery of debt or damages in the suit. Hence it is necessary to consider what was the legal effect of the verdict of the jury and a general judgment of the county court thereon in favor of the defendant in the replevin suit. The statute has changed the pleadings in replevin from what they were at common law. Instead of *non cepit* or *non detinet*, and other pleas allowed or required by the common law, V. S. 1471 provides that in this class of replevin "the general issue shall be joined on the plea of not guilty." The plea puts in issue the plaintiff's right to the possession of the property replevied, and the wrongful taking and detention thereof by the defendant. Hence the verdict of the jury determined that the plaintiff was entitled to the

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possession of the horse replevied, and that the defendant wrongfully took and detained it from him. When such is the finding of the jury, V. S. 1481 is, "the plaintiff shall have judgment for his damages caused thereby, and for his costs of suit." If no damages are shown by the evidence on trial, inasmuch as the verdict of guilty establishes that the defendant has invaded the plaintiff's right to the property replevied the law implies that the plaintiff is entitled to nominal damages. *Paul* v. *Slason*, 22 Vt. 231; *Fairbanks* v. *Kittredge*, 24 Vt. 9; *Fullam* v. *Stearns*, 30 Vt. 443; *Graves* v. *Severens*, 40 Vt. 640; *Cole* v. *Drew*, 44 Vt. 49; *Stevens* v. *Briggs*, 14 Vt. 44; *Bemus* v. *Beekman*, 3 Wend. 668; Cobbey on Replevin, §§ 1074 and 1075. The verdict of guilty conclusively established that the plaintiff invaded the defendant's right to the horse replevied, by attaching, taking, and detaining it from the defendant's possession. From the verdict the law gave the defendant nominal damages—no other damages being shown nor claimed in the trial before the jury—in the replevin suit. The general judgment, rendered thereon by the county court, and affirmed by this court, carried, if not in specific terms, by implication a judgment for nominal damages and costs agreeably to V. S. 1481. That the clerk in filing the execution omitted the one cent, or nominal damages, furnishes the plaintiff no just ground of complaint. He cannot for such omission have the execution set aside and held void because he has not been wronged, nor injured thereby. This view, without considering the other questions discussed, is conclusive against the right of the plaintiff to recover in this suit.

Judgment for the defendant to recover his costs.

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MARSHALL BROWN'S EXECUTOR *vs.* CHARLES HITCHCOCK and tr.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Statute of Limitations—Election.

The defendant promised to pay a sum stated or to allow the same to be applied in a certain manner, at the option of the promisee. The latter elected to make the application but failed to do so through no fault of the defendant. Meantime the statute of limitations had run in favor of the obligation to pay on demand. *Held*, that the action was barred.

GENERAL ASSUMPSIT. Pleas, the general issue, the statute of limitations and payment. Replication of special matter to the plea of the statute. Demurrer to the replication. Heard on demurrer at the March Term, 1896, Rutland County, *Taft*, J., presiding. Demurrer overruled and replication adjudged sufficient. The defendant excepted.

S. E. Everts and *J. C. Baker* for the defendant.

The only promise contained in the contract is the promise to pay on demand. The testator's option to apply the proceeds of certain property in his hands in payment does not change the character of the promise. If he elects to take his pay from the proceeds there is no basis to support this action. If he elects to enforce the promise by action he must stand upon the contract as a promise to pay on demand. *Hartranft's Estate*, 153 Pa. St. 530.

The testator had a right to bring his action immediately, and there was nothing in the option which restricted this right. *Palmer* v. *Palmer*, 36 Mich. 487; *Steele's Admrs.* v. *Steele*, 25 Pa. St. 154.

J. B. McCormick and *Edward Dana* for the plaintiff.

It is evident from the contract itself that the amount

called for was to be paid out of the defendant's share in the estate, if Brown should so elect, and that a delay in the payment was contemplated until the sale of the real estate. Brown did elect to make the collection out of the proceeds, and therefore to delay the collection until the sale, as set forth in the replication; and the sale was made within the statutory period. The defendant is estopped from pleading the statute. *State Trust Co.* v. *Sheldon*, 68 Vt. 259; *Gay's Est.* v. *Hassom*, 64 Vt. 495; *Burton* v. *Stevens*, 24 Vt. 131; *Randon* v. *Toby* 11 How. 493.

When a possible delay is contemplated by the express terms of the contract, the statute does not begin to run until the contemplated delay is terminated. *Stanton* v. *Est. of Stanton*, 37 Vt. 411.

TYLER, J. Marshall Brown was the executor of the will of Robert H. Smith, and the defendant was a legatee and devisee under the will. The plaintiff as executor seeks to recover of the defendant in the common courts in assumpsit, the amount of three promissory notes, the first of which, dated August 8, 1873, is as follows:

"I, Charles Hitchcock, have received of Marshall Brown, as executor of the will of Robert H. Smith, late of Pawlet, Vt., deceased, four hundred and fifty dollars, which I agree to pay to him on demand with interest annually at the rate of 7 per cent. per annum from this date, or to allow and apply the same to him on the settlement or division of the real estate of Robert H. Smith, or out of the avails or proceeds thereof, when sold, or of my share thereof as said Brown may hereafter elect, with interest on the same annually at the rate of 7 per cent.

(Signed) CHARLES HITCHCOCK."

The other two notes are in the same terms, differing only in dates and amounts, the second dated October 1, 1874, given for $100, the third dated October 27, 1874, given for $100.

The defendant pleaded, first, the general issue; second,

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that he did not assume and promise at any time within six years and thirty days next before Marshall Brown's death; third, that the causes of action did not accrue within six years and thirty days next before that time; fourth, payment. The plaintiff joined in the *similiter* to the general issue, replied special matter to the second and third pleas and traversed the fourth. The case comes here upon the demurrer to the replication to the second plea.

The defendant's promise was in the alternative—to pay the notes on demand, or out of the real estate, or the avails thereof at the payee's election.

The replication alleges that said Brown in his life-time and the plaintiff since Brown's decease, made their election not to require payment of said sums on demand, but relied upon the alternative promise and therefore brought no action in Brown's life-time. It further alleges that a settlement and division of the estate of said Brown had been made, and that a portion thereof had been decreed by the probate court to the defendant. It alleges no breach of the alternative promise by the defendant, nor any act of his by which the plaintiff was prevented from applying the proceeds of the sale of said real estate upon the notes at his election. For anything alleged the plaintiff might have made his election and applied such proceeds upon the notes. It in fact alleges that the plaintiff did make his election, but failed to make an application of the money received, but through no fault of the defendant.

Therefore the second plea is a good answer to the declaration, and the replication, which is only an amplification of the declaration, is no answer to the plea, but it shows that the plaintiff had no cause of action. The form of judgment is adopted as in *Dunklee* v. *Goodenough*, 65 Vt. 257.

Judgment reversed; demurrer sustained; declaration adjudged insufficient and cause remanded.

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JAMES A. REED *vs.* ALONZO STARKEY.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Conditional Sale—Attaching Creditor—Secret Trust.

A conditional vendor's lien, though unrecorded, is good as against an attaching creditor with notice.

A conditional vendor does not waive his lien by attaching the property sold.

An attachment sale which is really only an arrangement between the purchasing creditor and the debtor that there shall be the form of a sale while the latter shall retain the use and benefit of the property as before, is fraudulent and void.

An officer who holds property under an execution, holds it for the execution creditor, and if such creditor has a conditional vendor's lien thereon, the officer may defend in that right against replevin by a stranger.

REPLEVIN. Plea, the general issue. Trial by jury at the March Term, 1896, Windham County, *Munson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

With respect to the secret trust, the court instructed the jury that if the plaintiff had the property sold upon his attachment under an arrangement with the debtor that the sale should be one in form only, while the debtor should retain the use and benefit of the property as before, the sale was void and conveyed no title to the plaintiff as purchaser.

Clarke C. Fitts for the plaintiff.

There was no secret trust in this case because the only arrangement which the evidence tended to show was made subsequent to the judicial sale.

The evidence did not tend to show notice to the plaintiff of Brown's lien.

Waterman, Martin & Hitt for the defendant.

The evidence tended to show both that the plaintiff had

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notice of Brown's lien and that the judicial sale was fraudulent, and the charge submitted both questions in accordance with the well established doctrine in this State. V. S. 2290; *Watson* v. *Goodno*, 66 Vt. 229; *Webster* v. *Denison*, 25 Vt. 493; *Taylor* v. *Wait*, 52 Vt. 544; *Boardman* v. *Keeler*, 1 Aik. 158.

The defendant held possession for Brown. It could make no difference to the plaintiff whether the wagon was taken on the writ or the lien. He must fail unless his title is better than Brown's. *Keniston* v. *Stevens*, 66 Vt. 351; *Bank* v. *Miller*, 67 Vt. 66.

TYLER, J. Replevin for a wagon which was taken by the defendant as deputy sheriff, upon an execution issued July — 1895, in favor of H. R. Brown *v.* J. D. Reed, a son of the plaintiff, upon a judgment duly rendered.

It appeared that in May, 1894, Brown sold the wagon to J. D. Reed for the sum of $67.50, payable in monthly installments of $10, upon condition that the wagon should remain Brown's property until the price was fully paid. The contract of sale was oral, and only from $20 to $30 of the purchase price was ever paid.

A few days after this contract was made the plaintiff brought a suit against J. D. Reed and attached the wagon with other property, and by an agreement between the parties to the suit all the property attached was, on Aug. 20th, sold upon mesne process, as provided by statute. The attorney for Brown in the suit upon which this execution was issued, who was also attorney for the defendant in this suit, acted as attorney for the plaintiff in the matter of the sale and bid off the wagon and some other property for the plaintiff.

The plaintiff's evidence tended to show that subsequent to this sale the plaintiff and J. D. Reed made an agreement by which the latter should remain in possession of the wagon and the other personal property which had been bid off for the plaintiff at that sale; that J. D. Reed should dispose of

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the property and turn the proceeds over to the plaintiff or apply the same on his account; that the attorney had knowledge of this arrangement; that when Brown brought the suit in which this execution was issued all of such property except the wagon had been so disposed of, and that the wagon had been in the possession or control of J. D. Reed and never had been in the possession of the plaintiff. At the Sept. Term, 1894, of Windham County Court, the plaintiff obtained a judgment in his suit against J. D. Reed, an execution was issued, and a return of the sale on mesne process was made on the execution.

The plaintiff claimed title to the wagon by virtue of his attachment and his purchase at the sale on the writ. The defendant claimed that the plaintiff had notice of Brown's lien, at the time of the attachment and sale so that the lien was as effectual as to him as though it had been recorded; also that the proceedings by which the plaintiff sought to acquire title to the property and the possession, use and disposal of it by his son, under the agreement mentioned, constituted a secret trust between the plaintiff and his son, and that the plaintiff acquired no title.

The plaintiff's counsel contends that there was no evidence tending to show that the plaintiff had notice of the existence of Brown's lien.

We think the jury might properly have inferred from the plaintiff's answers on cross-examination respecting the attachment and sale that he had such knowledge.

The wagon was in the officer's hands undisposed of when replevied by the plaintiff, and the plaintiff was bound to show a better title than Brown's in order to maintain his action. If he had notice of Brown's lien when he attached the wagon, or if there was a secret trust between him and his son in respect to the wagon, he did not have a better title than Brown. These questions were submitted to the jury with proper instructions.

The attachment of the wagon by Brown did not operate

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per se as a waiver of his lien. Rob. Dig. Sup. 260, pl. 51. It cannot be said that the plaintiff resorted to inconsistent remedies. Though the defendant held it on Brown's execution when it was replevied, it was Brown's property as against the plaintiff and the defendant was holding it as such.

Judgment affirmed.

WALTER C. LANDON *vs.* JOHN F. BRYANT.

October Term, 1896.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Endorsement of Overdue Note—Waiver of Demand and Notice.

To charge the endorser of an overdue note, demand must be made and notice given as if the note became due on the day of the endorsement.

In such case, waiver of demand and notice cannot be inferred merely from the fact that the endorser understood the note was being bought to give the maker more time.

GENERAL AND SPECIAL ASSUMPSIT. Plea, the general issue with notice and payment. Trial by jury at the March Term, 1896, Rutland County, *Taft*, J., presiding. At the close of the plaintiff's testimony, the defendant rested and moved for a verdict in his favor, which was directed and judgment rendered thereon, and the plaintiff excepted.

The action was brought upon a promissory note dated April 9, 1889, signed by E. H. Davis, payable four months after date, to the order of the defendant. The note bore the endorsement of the defendant in blank.

May 16, 1890, the defendant sold and transferred the note to one S. P. Curtis, endorsing it as before stated, and

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said Curtis afterwards sold and transferred the note to the plaintiff. The plaintiff introduced evidence which he claimed tended to show a waiver of demand and notice by the defendant at the time of the endorsement. The scope of such evidence is stated in the opinion.

Horace W. Love for the plaintiff.

The plaintiff was entitled to the most favorable inference which could have been drawn from his evidence. When the defendant sold the note to Curtis he waived demand and notice by tacitly agreeing to an extension of time. II Dan. Neg. Inst. § 1103, and cases there cited; *McMonigal* v. *Brown*, 45 Ohio St. 499: 15 N. E. R. 860.

G. E. Lawrence for the defendant.

The note being overdue when endorsed, immediate demand and notice was necessary to hold the endorser. *Nash* v. *Harrington*, 2 Aik. 9.

The evidence had no tendency to show a waiver of demand and notice.

MUNSON, J. To charge the endorser of an overdue note, demand must be made and notice given as if the note became due on the day of the endorsement. *Nash* v. *Harrington*, 2 Aik. 9. The plaintiff conceded that this had not been done, and sought to hold the defendant on the ground of waiver. The court held there was no evidence tending to show a waiver; and this holding was correct. Giving the testimony the largest scope possible, its only tendency was to show that the defendant understood the note was being bought to give the maker more time. The jury could not be permitted to infer a waiver from the mere fact that the endorser had this understanding.

Judgment affirmed.

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TOWN OF GRANVILLE *vs.* TOWN OF HANCOCK.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Pauper—Residence—Scope of Recovery.

That town in this State wherein the pauper "last resided for three years" etc., is liable under the statute, notwithstanding he afterwards resided without the state.

While a pauper in one town receiving support from another town is, by implication of law, a resident in the latter, that implication ceases when he ceases to need and receive assistance, and from that time he begins to acquire a residence in town where he may be.

V. S. 3172 does not forbid a recovery for expenses incurred within sixty days before action brought.

ACTION to recover expense incurred in supporting a pauper. Trial by jury at the December Term, 1895, Addison County, *Taft*, J., presiding. A verdict was directed and judgment thereon rendered for the plaintiff. The defendant excepted.

Stewart & Wilds for the defendant.

The right of recovery must depend upon the proof of a three years' residence in the defendant town subsequent to the pauper's return to the State. His return should not be held to revive his old residence. This construction will promote the object of the law by limiting the field of enquiry.

The case of *Sandgate* v. *Rupert*, 67 Vt. 258, if carried to its logical conclusion will defeat the plaintiff.

The statute contemplates the right of redemption within sixty days and expenses incurred within that period are not recoverable.

Button & Button for the plaintiff.

A residence in another state does not preclude a recovery from a town otherwise chargeable by reason of a prior three years' residence. *Georgia* v. *Grand Isle*, 1 Vt. 464; *Tun-*

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bridge v. *Norwich*, 17 Vt. 493; *Dover* v. *Wheeler*, 51 Vt. 160, 167; *St. Johnsbury* v. *Concord*, 68 Vt. 481.

The pauper might well acquire a residence in the defendant town after ceasing to receive support from Middlesex. He had a right to become self sustaining and thereby gain a new residence. *Rupert* v. *Sandgate*, 10 Vt. 278; *Dorset* v. *Manchester*, 3 Vt. 370; *Stowe* v. *Brookfield*, 26 Vt. 524; *Poultney* v. *Sandgate*, 35 Vt. 146; *Cabot* v. *Washington*, 41 Vt. 168.

The pauper's presumed residence in Middlesex, while being supported by that town, in Hancock, ceased when he became self supporting. *Barnet* v. *Ray*, 33 Vt. 205; *Leicester* v. *Brandon*, 65 Vt. 544; *South Burlington* v. *Worcester*, 67 Vt. 411.

The statute requiring sixty days' notice before the commencement of suit, was enacted to enable the defendant town to ascertain the facts, not to limit the plaintiff's recovery.

Ross, C. J. This is an action to recover for supporting a pauper. The court directed the jury to return a verdict in favor of the plaintiff. On the question of the residence of the pauper, in argument, the attorneys have treated, as proved, all facts which the exceptions state that the evidence tended to prove. We assume that they so treated them when each asked the court to direct the jury to return a verdict in favor of his client. We shall consider the case as though the exceptions stated that the evidence tending to show these facts was uncontroverted and that the parties waived the right to go to the jury in regard to the facts established thereby. On this basis the pauper resided in the defendant town supporting himself and family from July, 1873, to January, 1877. In March, 1877, upon proper proceedings he was ordered to removed from the defendant town to the town of Middlesex. The return of the officer, serving the order, shows that the pauper was not removed because his wife was sick and unable to be removed. Middle-

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sex then assumed his support and supported him for some time, but the exact length of time is not stated. The pauper remained, during this time, in the defendant town. In 1888, the pauper removed to Northfield, but returned to the defendant in March, 1889. In 1891, he abandoned his domicile in Hancock and took it up in Massachusetts for about ten weeks, when he returned and took up his domicile in Hancock. The defendant offered to show, but the offer was excluded, against its exception, that the pauper after Middlesex ceased to furnish him support remained in the defendant town supporting himself and family for more than three years continuously.

(1) On these facts the defendant does not contend that the pauper did not reside in Hancock three years continuously while supporting himself and family, from July, 1873, to January, 1877, but claims that this residence cannot avail the plaintiff because of the residence of the pauper in Massachusetts for a short time in 1891. V. S. 3171 treats of the support of paupers only with reference to the towns of this State, and provides, that if the pauper at the time when he is in need of relief has not resided in the town furnishing the support "for three years supporting himself and family and is not of sufficient ability to provide such assistance, the town so furnishing the same may recover the expense thereof from the town where he last resided for the space of three years supporting himself and family." There is no limitation in regard to when the "last three years residence" shall have occurred with reference to the time when the person is in need of assistance, nor any mention of such residence being unavailing if thereafter the pauper had taken a residence in another state. This section of the statute is framed to fix definitely the town upon which the burden of supporting a person in need of assistance and who is not of sufficient ability to provide it, shall rest between the different towns of the State, where the law is operative. It takes no account of such pauper's residence

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out of the State. Such was the early interpretation of the similar statute in regard to the settlement of paupers. *Georgia* v. *Grand Isle*, 1 Vt. 464. The reasoning of the court in that decision is applicable to the proper construction of this section of the statute.

This contention cannot be maintained.

(2) The defendant further contends that the evidence offered by it was erroneously rejected by the court. It appeared that in 1877 the pauper was, under the statute then existing, ordered to remove with his family from Hancock to Middlesex; that the pauper's wife was sick and not able to be removed, and that upon service of the order of removal upon Middlesex that town for a time supported the pauper and his family in Hancock. He contends,—and such appears to be the import of the decisions of this court—that while being thus supported the pauper, although remaining with his family in Hancock, was, because under the control and direction of Middlesex, in law, a resident of Middlesex. It offered to show that after Middlesex ceased to support the pauper and his family in Hancock, the pauper still being in Hancock supported himself and family without aid from any town for more than three years, and contended that for these three years the pauper's residence should be treated as continuing in Middlesex, so that the pauper's last three years of residence under this section would be in Middlesex and not in Hancock. This contention is unsound. If, under the decisions, the pauper, while being supported by Middlesex, although remaining in Hancock, was in law, to be treated as residing in Middlesex, because Middlesex had the right to, and, in the eye of the law, did control the pauper's place of abode, and, for that reason, his residence during that time, in law, was in Middlesex, such implication of the law, in regard to the pauper's residence, ceased when Middlesex ceased to furnish, and to be under legal obligation to furnish the pauper assistance. Its power to control the abode or residence of the pauper then ceased. The person who had been assisted, as soon as he became

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able to and did furnish his own support for himself and family, would have a residence in his own right in the town of Hancock, and not a residence by implication of law in Middlesex. Hence, if the offered testimony had been received, it would have established only a more recent three years' residence of the pauper in Hancock. It would have furnished no semblance of a defense to this action by Hancock. The rejection of the offer was therefore harmless error.

(3) The county court allowed the plaintiff to recover for aid furnished within sixty days prior to the commencement of this action. The defendant insists that this was error, and excepted thereto. V. S. 3172 does not allow an action to be commenced for furnishing assistance to a pauper where support by reason of residence is cast upon some other town, until sixty days after it has given notice of the condition of the pauper, or family, to the town under the legal duty to furnish such support. This time is given, evidently, to furnish the notified town a reasonable opportunity to investigate in regard to its liability and duty to assume the support of such pauper and family. It does not, in terms, if the town notifying is compelled to bring suit, limit its right of recovery to expenses properly incurred more than sixty days before suit is brought. Nor do we think that such a construction can fairly be given to this section. While it provides that actions for support, thus furnished, shall not be brought oftener than every sixty days, recovery may be had for all expenses incurred to the time the action is brought; at least such recovery is not inhibited. If the town notified,—after the first action has settled its liability,—does not assume the support of the pauper, the court may in its discretion impose double costs in subsequent actions. The recovering town must wait sixty days after the first recovery before it can bring a second suit in which the court may impose double costs. We find no error in the action of the county court.

Judgment affirmed.

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JOHN McKINDLEY *vs.* JOHN H. DREW.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Measure of Damages—Fraud in Sale of Policy—Evidence.

In an action of tort against an insurance agent for inducing the plaintiff to take a policy by fraudulent misrepresentations concerning its provisions, the measure of damages is not the difference in value between the policy as it was and as it was represented to be, but the difference between the amount of premiums paid by the plaintiff and the value to him of the insurance while it remained in force.

The plaintiff was properly allowed to show his own ignorance of insurance and the defendant's familiarity therewith as tending to show that he was actually deceived by the defendant's representations.

It was competent for the plaintiff to show the amount of the commission which the defendant was entitled to receive, and that he was working for a prize offered by the company to the agent who should return the largest amount of insurance,—the defendant being a witness in his own behalf.

The fact that the defendant, within three months before the interview in question, had taken a large number of applications for insurance was admissible as making it less probable that he would remember the details as distinctly as the plaintiff.

The defendant offered to show by a witness, who was a policy holder in the same company, that the plaintiff came to the witness with the agent of another insurance company and asked him whether he would throw up his policy if such agent would bring a suit for him to recover the premiums he had paid. *Held*, that the evidence was properly excluded.

The defendant on the occasion in question used a book furnished by the company showing the amount of surplus on different classes of policies for one thousand dollars, from which the plaintiff claimed the defendant computed the amount of the surplus which would belong to the plaintiff's policy. It being somewhat uncertain from what pages the defendant figured, *held*, that the plaintiff had a right to exhibit in evidence any page that related to such surplus.

ACTION ON THE CASE. Plea, not guilty. Trial by jury at the June Term, 1895, Caledonia County, *Ross*, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

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The declaration was drawn in the double phase of contract and tort, but the plaintiff claimed to recover only upon the tort phase.

The book of instructions from the company, which the defendant used when he solicited the plaintiff, was produced by him in court and the plaintiff was allowed to introduce several pages relating to estimates of surplus upon policies like the one in question in respect to the age of the insured and the term and general character of insurance. The estimates were based upon policies of one thousand dollars and the plaintiff's testimony tended to show that the defendant obtained the amount of the surplus which the policy would guarantee to the plaintiff by multiplying the amount stated in the book. To the admission of these pages the defendant excepted.

The defendant offered to show by Fremont Nelson, who had also taken a policy in the New York Mutual Life Insurance Company at the solicitation of the defendant, that the plaintiff came to him with Mr. Way, an agent for another insurance company, and asked the witness whether he would throw up his policy if Mr. Way would bring a suit for him to recover the premiums he had paid. The court excluded the testimony and the defendant excepted.

Bates & May, *Dunnett & Slack* and *Harry Blodgett* for the defendant.

The evidence of the plaintiff, as to his own ignorance of life insurance and the defendant's familiarity therewith, was incompetent. It did not appear that the defendant was aware of the plaintiff's ignorance. There was no relation of confidence between the parties.

The court improperly admitted evidence touching the amount of the defendant's commission and the prize offered by the company. If the defendant's intent had been in question a different rule might have been correct, but his intent was immaterial. *Haycraft* v. *Creasy*, 2 East. 92; Cooley, Torts, 474. It cannot be said that the evidence was

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admissible as making it more probable that the defendant would misrepresent, since this would require a second presumption, viz, the defendant's dishonesty. Stephens' Dig. Ev. art. 9.

The plaintiff should have been confined to those pages of the instruction book which were clearly the subject of discussion between the parties.

The court should have admitted the evidence offered by the defendant by Fremont Nelson.

The charge of the court upon the measure of damages was incorrect.

W. P. Stafford for the plaintiff.

The plaintiff was properly allowed to show his own ignorance of insurance matters, because this helped to show that he was in fact deceived, and to show the defendant's familiarity with such matters, because this helped to show that the defendant deceived him purposely. The defendant's intent was certainly material upon the question of exemplary damages.

It was proper to show the defendant's motive to misrepresent by way of his commission and the pending prize.

There was no error in admitting the several pages of the instruction book. The plaintiff had a right to put in such pages as his evidence tended to prove might have been shown him. If they did not support his claim they did not injure the defendant.

The Fremont Nelson evidence was properly excluded. *Norton* v. *Gleason*, 61 Vt. 474.

The measure of damages was correctly stated to be such a sum as would make the policy delivered equal to the policy sold. *Bowman* v. *Parker*, 40 Vt. 410. That the subject of sale was a contract instead of some other thing does not alter the rule. The declaration is in the form approved in *Beeman* v. *Buck*, 3 Vt. 53, and *Goodenough* v. *Snow*, 27 Vt. 720. The plaintiff would have been entitled to a verdict upon proving the warranty and breach, without proving

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the purpose to deceive. He chose to treat his case as one in tort and to have the rule applied which requires proof of the intention to deceive. But the measure of damages was the same in either case.

TYLER, J. The plaintiff's evidence tended to show that the defendant, by false and fraudulent representations, induced him, for an annual premium of $262.50, to take a $5,000 endowment policy in the N. Y. Mutual Life Insurance Co., with a right to whatever surplus the policy might be entitled to under the rules of the company; that the policy was payable in twenty years, or at an earlier time in the event of the plaintiff's death, he having a right to withdraw at any time after making three payments, when he would receive a paid up policy for as many twentieths of the $5,000 as he had made payments; that the fraudulent representations were, that the surplus which was to apply upon the policy was guaranteed by the company to be $4,800, and that if the plaintiff withdrew he would receive his twentieths in cash; that he paid the first premium on the delivery of the policy and the second a year thereafter, when, on account of the fraud, he decided to make no further payment and brought this suit.

The defendant denied making the fraudulent representations.

On the trial the plaintiff abandoned the contract phase of his declaration and claimed to recover only upon the ground of fraud.

(1) The court did not err in permitting the plaintiff to show his own ignorance of life insurance and the defendant's familiarity therewith. It tended to show that he relied upon the defendant's representations and was deceived by them.

(2) It was competent for the plaintiff to show that the defendant was entitled to receive from the company a part of the first premium, and that he was working for a prize that had been offered by the company to the agent who would return the largest amount of insurance. The defend-

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ant was a witness in his own behalf, and it was proper to show his interest in the matter in issue.

(3) The fact that the defendant had, within three months, taken a large number of applications for insurance might render it less probable that he would remember as distinctly as the plaintiff the details of the interview in question; therefore evidence of that fact was properly admitted.

(4) The offered testimony of Nelson was properly excluded as having no relevancy to the question in issue.

(5) It was not error to admit the several pages of the instruction book. The defendant used the book on the occasion in question, and the plaintiff claimed that the defendant showed him some pages from which he figured a $4,800 surplus on a $5,000 policy. The plaintiff had a right to exhibit in evidence any page that related to the subject matter of such surplus. The other pages were of course immaterial. It did not seem clear what pages the defendant figured from, which probably led to the examination of several pages mentioned in the exceptions.

(6) The court instructed the jury that if they found either of the claimed misrepresentations set forth in the declaration established, the plaintiff would be entitled to recover such damages as would make the policy of the value it would have had if it had been as represented. In this there was error. This would have been the rule had the plaintiff elected to proceed under the contract, which he might have done. But he was not bound to perform the terms of a contract to which he never gave his assent—to pay annual premiums upon a policy which he did not purchase. The fraud invalidated the contract, and upon its discovery the plaintiff had a right to rescind it and be placed *in statu quo.*

No point is made in the brief of defendant's counsel, nor was it raised in the court below, that the plaintiff should have expressly refused to make further payments and returned the policy. The contract was executory, and upon discovery of the fraud the plaintiff had a right to repudiate

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it and treat it as a nullity. His acts were a repudiation and a rescission of the contract.

The only question is, what damages is the plaintiff entitled to recover? The general rule is that the party who would rescind a contract on account of the fraud practiced upon him by the other party must seasonably return the property to him and put him *in statu quo*. If the plaintiff in this case had received dividends upon his policy the law would not permit him to recover the premiums and retain the dividends, for then the other party would not be placed *in statu quo*. The plaintiff had received no dividends to be returned, but he had been insured for a year and a half before he rescinded the contract, and if he had died within that time his estate would have received $5,000 from the insurance company; so it cannot be held as matter of law that he had received no benefit from the contract. The case should have been submitted to the jury with instructions that the plaintiff might recover the amount of premiums paid less the value, if any, of the insurance which he received. What value the insurance was to him was for the jury to determine.

The case of *Hedden* v. *Griffin*, 136 Mass. 229, is like the one at bar. There the defendant, as a general agent of a life insurance company, by false and fraudulent representations induced the plaintiff to take a policy in the company. Upon discovering the fraud the plaintiff gave the defendant notice of his rescission of the contract, demanded a return of the premiums paid and brought the suit therefor. The court refused to instruct the jury that the rule of damages was the difference in money value between what the plaintiff got and what he would have got had the representations been true, but did instruct them that upon the rescission of the contract the plaintiff should recover the amount of money paid less the value of the insurance, if any, which he had received. The supreme court sustained the ruling and afterwards reaffirmed its soundness in *Nash* v. *Minn. Title*

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Ins. & Trust Co., 163 Mass. 574, though it referred to an intimation made by the court in the former case that the plaintiff might recover the whole consideration paid without any deduction for the protection which he had before the rescission. These rulings are in accordance with the general rule of law requiring a return of the property on the rescission of a contract on account of fraud.

Judgment reversed and cause remanded.

STATE *vs.* HARVEY BADGER.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Evidence.

In a prosecution for breach of the peace, declarations made after the affray by the party alleged to have been assaulted, are not admissible.

INDICTMENT for breach of the peace. Plea, not guilty. Trial by jury at the September Term, 1895, Washington County, *Thompson*, J., presiding. Verdict, guilty. The respondent excepted.

J. P. Lamson for the respondent.

Zed S. Stanton, State's Attorney, for the State.

TYLER, J. Indictment for a breach of the peace. The State's evidence tended to show that the respondent called one George Oderkirk to the door of the latter's house in the night time and assaulted him with an axe. The respondent's evidence tended to show that no axe was used by him, and this was a material issue in the trial.

It appeared that after the affray one George W. Barnett went to Oderkirk's house, was there the remainder of the

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night and had conversation with Oderkirk and his wife. The respondent's counsel asked the witness this question:

"I want you to state whether you yourself at that time said anything to Oderkirk whether the wound was or was not made with an axe?"

It appeared that Oderkirk's wife saw the whole affray, and the respondent's counsel asked the witness Barnett:

"Was anything said there that night by Oderkirk's wife to George, whether Badger struck him with an axe or not?"

Both questions were excluded, and the respondent excepted.

The conversation was not a part of the *res gestae* of the affray, and it is not claimed that the answers, if given, would have had any tendency to contradict the testimony which the witness had given in the trial. Counsel suggest in their brief no ground upon which the evidence was admissible and there was none.

Judgment that there was no error in the proceedings, and that the respondent take nothing by his exceptions.

HARVEY BADGER *vs.* STATE.

October Term, 1896

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

New Trial.

A petition for a new trial will not be granted for absence of witnesses, when the petitioner, knowing the facts, made no request for a continuance.

In the case at bar, it is considered highly improbable that the new evidence would produce a different result.

PETITION for a new trial. The petitioner was convicted of

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a breach of the peace at the September Term, 1895, Washington County. The grounds of the petition and the tendency of the new evidence are stated in the opinion.

J. P. Lamson for the petitioner.

Zed S. Stanton, State's Attorney, for the State.

TYLER, J. The petition is brought upon two grounds, first, the absence from the trial of two witnesses, whose testimony, it is alleged, would have been material to the petitioner; second, newly discovered evidence.

Assuming it to be true that Annie Oderkirk and George A. Barnett were not within the reach of a subpœna nor within the control of the petitioner at the time of the trial, it was then his obvious duty to have moved for a continuance of the case. It must be presumed that such a motion would have been granted, if supported by affidavits of the facts now alleged as to the importance of the testimony of the two witnesses and that their attendance could not be procured at that term.

The petitioner elected to go to trial with such evidence as he had and without objection, so far as the case discloses. The petition and testimony in *Geno* v. *The Fall Mountain Paper Co.*, 68 Vt. 568, heard at last May Term presented a much stronger case in this respect than does the case at bar.

But passing the question of the petitioner's *laches* in going to trial without the testimony of these witnesses, the evidence produced by the State in this proceeding, which tended to show Mrs. Oderkirk's version of the affray given directly after it occurred, as well as later ón, in which she confirmed her husband's testimony, and the State's evidence tending to contradict the other new witness Barnett, considered in connection with the petitioner's rebutting testimony, render it extremely improbable that a different result would be arrived at in another trial.

The second ground of the petition is that the State's principal witness, George Oderkirk, freely admitted, both

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before and after the trial, that the petitioner did not assault him with an axe; that Oderkirk had admitted that he swore falsely at the trial for the purpose of procuring the petitioner's conviction, and that he had declared that he would considerately absent himself from another trial if one were had.

It is quite improbable that the witness should have told his neighbors and acquaintances, previous to the trial, that the petitioner did not strike him with an axe, and having testified that he did so strike him, on his way home after the trial confessed to the affiant Little, and afterwards to the petitioner, that he had committed perjury. The affidavits tending to show Oderkirk's admissions, when considered in connection with his denial of them, are entitled to but little weight.

The case seems to have been tried mainly upon the issue whether the assault was with an axe or not. No surprise seems to have been manifested by the respondent's counsel at Oderkirk's testimony, and none of the affiants with whom he is said to have conversed about the affray, during the summer before, seem to have been ready to contradict him.

We do not think that this evidence, either alone or in connection with the proposed testimony of Mrs. Oderkirk and Barnett, in the light of the contradictions and improbabilities, would be likely to produce a different result at another trial of the case.

The petition is dismissed.

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WILLIAM H. FORBES *vs.* FRANK A. MORSE.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Evidence.

In an action for enticing away the plaintiff's servant, an undated letter from the defendant to the servant, unsupported by direct testimony as to when it was written or received, was held to contain internal evidence that it was written while the contract of service was in force and unbroken, and to be in substance pertinent to the issue.

There having been evidence that a course of persuasion had been entered upon, evidence of opportunity to persuade was admissible.

CASE for enticing away the plaintiff's servant. Plea, the general issue. Trial by jury at the March Term, 1896, Rutland County, *Taft*, J., presiding. Verdict directed, and judgment thereon rendered, for the defendant. The plaintiff excepted.

On July 30, 1890, a contract was made between the plaintiff and Lucy Wells that she should keep the plaintiff's house and look after his children so long as they should need a home there and that the plaintiff should treat her kindly and discontinue certain law suits between them. She was not to begin until her parents ceased to need her care. Her father having died September 24, 1890, she entered upon her performance of the contract November 8, 1890, and continued thereunder until about May, 1, 1891, when she left the plaintiff's service without his consent.

The defendant testified that he found the letter recited below upon a stand in Miss Wells' room during her stay at his house; that it was in the defendant's handwriting, and that the copy produced was made by him and is correct; that many letters passed between the defendant and Miss Wells while she was at his house; that there was an envelope with the letter in question which was new in appearance,

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but that he did not copy it and could not remember its date. The plaintiff produced no other testimony as to the time when the letter was written or received.

The letter read as follows:

"HOME, Sabbath P. M.

My Dear Sister:—

Having a postal to send you thought you would pardon me if I should add a few lines. I am lonely today and should be so happy if you were here to chat with me. Since I wrote you I have taken a very short vacation. Left home Thursday at 3.40 for Holyoke, Mass., stopped over night with cousins in North Adams. Next day went on to Holyoke and returned last eve. I had as pleasant a time as one would naturally have all alone. Bought quite a bill of stationery. Saw Mr. Dr. Hemner a few moments. Weather was terrible hot and some rain. Tuesday has been more comfortable. My dear sister, it does seem so strange to have you away from here and Castleton too. It grows more lonely each day. It seems some times as if I never was to see you again. Saw Judge Bromley on the train last eve., says he heard from pretty good source that Prof. Leavenworth and Miss Wardsworth were to be married before school opened. This is all a secret. What do you think about it, wouldn't we have some talking to do if ——— was to carry you to Castleton tonight?

Must not write more now. Wish you could see my sweet peas; they are just immense. Wish I could pick you some tonight. Lucy, I wish you could have heard Mr. B. last night. It seemed just the thing for you. Of course we always find some one else for the coat to fit. He said rash promises were far better broken than kept. I do so wish you were back at Castleton. You cannot think how strange it seems to me coming through there one week ago Sunday eve., to think I could perhaps never stop there as I have so many times and receive your pleasant welcome. I think you had better come back. I mean just what I say and I am

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sure unless you feel different from what I think you do that it is your solemn duty to come. Wouldn't we all try to be happy once more? You do not know how much I miss you. But I must not say so, must I? Would send you some sweet peas if it would do. We have lots of them and they do look so fine from my window where I am writing. But I must close. I will only add, that if you do not like Mr. Forbes I think it very unkind in him to ask you to leave your school and sacrifice so much for him. Love to Herbert and much for yourself, from

BROTHER FRANK."

The court ruled that there was no evidence tending to show that the letter was written or received between July 30, 1890, when the contract was made, and the May following, when Miss Wells left the plaintiff's service, and excluded the letter; to which the plaintiff excepted.

The court also excluded, against the plaintift's exception, the deposition of B. G. Howe, the substance of which is stated in the opinion.

Miss Wells and a deceased wife of the plaintiff and a deceased wife of the defendant, were sisters. The defendant was married to Miss Wells in May, 1892.

Horace W. Love for the plaintiff.

Henry A. Harman and *George E. Lawrence* for the defendant.

MUNSON, J. On the thirtieth day of July, 1890, Lucy Wells contracted with the plaintiff to become his housekeeper upon the happening of a certain contingency. She entered the plaintiff's service under this contract on the eighth day of November, 1890, and remained in it until the first of May, 1891. The plaintiff claims that she was enticed from his service by the defendant.

The plaintiff offered evidence of the contents of an undated letter in the defendant's handwriting, which was found on a stand in Miss Wells' room during her stay at the plaintiff's,

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having with it an envelope which had the appearance of being new. The court excluded this evidence on the ground that there was no testimony tending to show that the letter was written after the thirtieth of July, 1890, the date of Miss Wells' contract with the plaintiff.

It doubtless might have been held that there was no evidence tending to show that it was written after the eighth of November, the day Miss Wells entered upon her service; for the letter itself shows that it was written just after a period of extreme heat, and while the sweet peas visible from the writer's window were in full bloom. But a further consideration is necessary to determine whether there was evidence tending to show that it was written after July thirtieth, the date of the contract.

The whole burden of the letter is the writer's regret for Miss Wells' absence, and for the prospect of her continued absence, from Castleton, where she had been teaching. The last sentence connects the plaintiff by name with the subject-matter of the writer's regret. "If you do not like Mr. Forbes, I think it very unkind in him to ask you to leave your school and sacrifice so much for him." If this stood alone, it might seem to point to some proposition made, rather than to an arrangement actually entered into. But the writer had just before expressed his regret that she had not heard the recent remark of another, that "rash promises were far better broken than kept," saying, "it seemed just the thing for you." When the two are taken together they seem to refer to something which Miss Wells has agreed to do for the plaintiff which is inconsistent with the continuance of her work as a teacher. It must therefore be held that the letter itself affords evidence that it was written after the contract above referred to was made.

It is also apparent from this examination of the letter that it contained matters pertinent to the issue. If it had been admitted, there would have been evidence tending to show that the defendant had endeavored to persuade Miss

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Wells to deprive the plaintiff of a service which he knew she had contracted to render; and this, with the proof of her leaving, would have made a case for the jury; unless a different disposition was required by the fact that she entered upon the service notwithstanding the letter.

It may be objected that if the letter was written before the eighth of November it was written to prevent Miss Wells from entering upon the service contracted for, and failed of its purpose; and that if reperusals of it after the service was entered upon induced her to leave, that was an effect not designed by the writer, and one for which he would not be liable. It would seem, however, that if the language complained of was calculated to induce her to break the contract without reference to time or circumstance, it would make no difference whether it led her to do this by refusing to commence the service, or by leaving it after it was commenced. It is doubtless true that language might have been used for which the defendant could not have been made liable by reason of an abandonment of the service after it had been entered upon. But it will be noticed that the language used was general, and not suggestive of a breach in any particular manner; and, in view of its scope, we think the question of liability cannot be disposed of as a matter of law on the ground indicated.

With the letter in the case, the deposition showing that Miss Wells and the defendant met at a hotel in St. Johnsbury on the seventeenth of October, 1890, and passed the evening together, would be admissible. Perhaps its only tendency is to show opportunity, but when there is evidence that a course of persuasion has been entered upon, evidence of opportunity is admissible.

Judgment reversed and cause remanded.

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SAMUEL E. PINGREE, admr. *vs.* NELSON S. JOHNSON.

October Term, 1896.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Memorandum—Wife as Witness.

A memorandum upon the stub of a receipt book that the payment is "in full settlement," cannot be used, like a book charge, as independent evidence, but only to refresh the witness' recollection and in corroboration of his testimony. Consequently it is inadmissible if the witness did not know of its correctness when it was made.

A wife is not a competent witness on the ground of agency to transactions conducted in the presence of her husband.

GENERAL ASSUMPSIT. Pleas, the general issue, accord and satisfaction and payment. Trial by jury at the December Term, 1895, Windsor County, *Rowell*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The action was brought to recover a balance claimed to be due from the defendant to the plaintiff's intestate upon account. The defendant's evidence tended to show that a payment of ten dollars, made by his wife to the plaintiff's attorney in the defendant's presence and by his direction, was made and received in full settlement; that his wife, as his agent, kept all his books and at the time of this payment made a memorandum concerning the transaction on the stub of the defendant's receipt book from which the receipt for said payment was taken; that this memorandum was made in pursuance of her general employment as such agent without direction from the defendant and without his knowledge as to its contents at the time. The memorandum was as follows: "May 8, '93, N. S. Johnson from Alex. P. Nelson in full for the J. J. Simonds acct. $10.00." The memorandum was offered by the defendant as corroborating his own testimony, but was excluded.

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The defendant then offered his wife as a witness to the memorandum on the ground of agency. The court held that she was not competent.

William Batchelder for the defendant.

The memorandum would have been clearly admissible if made by the defendant. *Lapham* v. *Kelly*, 35 Vt. 195. It was just as admissible when made by his agent. It was really a part of the *res gestae*. I Green. Ev. *pp. 114, 115, 116, 120.

The wife was a competent witness to the memorandum having made it as agent without direction from her husband though in his presence. V. S. 1241 does not confine the wife's testimony to transactions in his absence. *Orcutt* v. *Est. of Cook*, 37 Vt. 518; *Lunay* v. *Vantyne*, 40 Vt. 501.

Hunton & Stickney for the plaintiff.

The memorandum is of a private character, made to preserve the recollection of the fact in case of the loss of the receipt, and not admissible as independent evidence. *Lapham* v. *Kelly*, 35 Vt. 195; *Godding* v. *Orcutt*, 44 Vt. 54. It was not admissible as confirming the defendant's testimony since he knew nothing of its correctness when it was made. The memorandum being inadmissible, the wife was incompetent.

TAFT, J. (1) The memorandum was not admissible as evidence confirmatory of the defendant's testimony; it was not the entry of a transaction creating an indebtedness, like the sale of goods, or performance of services, regularly charged upon the account book of a party, but a memorandum made upon the stub of a receipt book. It can be regarded in no other light than a private memorandum made to preserve the fact in the recollection of the party making it. As the defendant did not know what the memorandum was, it could not be used to strengthen his memory; it had not the force of independent evidence and could only be used, had the witness known its contents when made, to refresh his recollection, and in that connection

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allowed to go to the jury as confirming his testimony; his recollection could not be refreshed by a fact of which he was ignorant and never had knowledge.

(2) The wife of the defendant was not a competent witness. The sole purpose of the statute permitting a wife to testify to transactions by her in which she acted as agent of her husband is to enable the husband to prove transactions of which he has no personal knowledge. Whatever is done by the wife in the presence of the husband is done by him and not by her as his agent. *Barrett*, J., in *Estabrooks* v. *Prentiss*, 34 Vt. 457, says that the "entire scope and language of the statute indicates, that the purpose of that provision was to enable proof to be made of transactions of which the husband had not personal knowledge, and the wife had, for the reason she personally negotiated, as a substitute for, and in the place of her husband in such transactions." The rulings of this court have since that time been in accord with that case. In *Lunay* v. *Vantyne*, 40 Vt. 501, the transaction testified to by the wife occurred in the absense of the husband, and she was held competent. In *Pierce* v. *Bradford*, 64 Vt. 219, the acts shown by the wife were done by her in the absence of the husband and of which he had no personal knowledge, and her testimony was admitted. In *Bates* v. *Sabin*, Ibid. 511, the transaction was conducted in his presence and under his direction, and although it was conducted by his wife the court say "The transaction must be regarded as conducted by himself; it cannot be said that this business was had with or conducted by his agent, when he was present and directed to be done just what was done. The statute clearly has reference to business transactions conducted by the wife as the agent of her husband of which he had no personal knowledge." The ruling that the wife was incompetent in the case before us was correct. He was present when his wife paid the money and he directed her to pay it.

Judgment affirmed.

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JOHN W. CRAMPTON, assignee, *vs.* ESTATE OF D. L. KENT & Co.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Claim Provable in Insolvency.

A claim in favor of one insolvent firm is provable against the estate of another insolvent firm, although members of one are also members of the other, the business of the two firms being separate and distinct.

GENERAL ASSUMPSIT. The defendant filed two special pleas, to each of which the plaintiff demurred generally. Heard on demurrer at the June Term, 1896, Bennington County, *Start*, J., presiding. Demurrer overruled and pleas adjudged sufficient. The plaintiff excepted.

Batchelder & Bates for the plaintiff.

It must be considered that each firm carried on a separate and distinct business.

The defendant invokes a principle which is not applicable to this case. That principle is, that a firm is not permitted to prove a claim against the private estate of one of its own insolvent partners in competition with the general creditors of the firm, and, consequently, that a partner is not permitted to prove a claim against the insolvent firm of which he is a member. If the plaintiff's firm were a member of the defendant firm, or *vice versa*, this principle might apply. But that is not the case. The plaintiff does not ask to have the assets of the defendant firm distributed among the creditors of any of its individual members. He seeks to prove a claim of the insolvent firm of S. F. Prince & Co. against the defendant firm, the dividend on which will go to the creditors of S. F. Prince & Co. His right to have this done is fully supported by text books and decisions.

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Somerset Potters Works v. *Minot*, 10 Cush. 592; V. S. 2164; Parsons, Partnership, *pp. 480, 501; II Bates, Partnership, 490; *Re Buckhause Ex parte Flynn*, 2 Lowell Dec. 331; Cook, Bankr. Laws, 534; *M'Canly* v. *M'Farlane*, 2 Desaus. 239; *Hayes* v. *Heyer*, 35 N. Y. 326; *Ex parte St. Barbe*, 11 Ves. 413; *Ex parte Hesham*, 1 Rose B. C. 146; *Ex parte Hargreaves*, 1 Cox Ch. Cas. 440.

Butler & Moloney for the defendant.

An insolvent firm cannot compete with its own creditors. A firm cannot prove a claim against the individual estate of one of its partners, nor can a member prove a claim against his firm. This rule is recognized in *Somerset Potters Works* v. *Minot*, 10 Cush. 592; *Murrill* v. *Neill*, 8 How. 421; *Amsinck* v. *Bean*, 22 Wall. 395; *Washburn* v. *Bank of Bellows Falls*, 19 Vt. 278; *Bardwell* v. *Perry*, 19 Vt. 292.

Insolvency ends the joint relation, and it is not material whether the firms were partners with each other. No adjudged case has recognized this distinction. *Ex parte Williams*, 3 M., D. & De. G. 433; *Ex parte Sillitoe*, 1 Gl. & Jam. 382; *Ex parte Hargreaves*, 1 Cox Ch. Cas. 440.

TYLER, J. The plaintiff, as assignee of the insolvent estate of S. F. Prince & Co., filed a claim in the court of insolvency against the insolvent estate of D. L. Kent & Co. The claim was disallowed and the plaintiff appealed to the county court where he filed a declaration in the common counts in assumpsit and the defendant filed two pleas thereto, the first alleging that the claimant was a co-partnership composed of Samuel F. Prince, John F. Prince and Charles B. Kent, and that the defendant was a co-partnership composed of the same Samuel F. Prince and John F. Prince; that during the time when the alleged causes of action accrued both firms were engaged in the business of quarrying, manufacturing and selling marble at Dorset in this State and had mutual dealings; that advancements and loans of money and advancements, loans and sales of

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marble were, during that time, made between the two firms so composed in respect to members, and that the alleged causes of action accrued solely by reason of such loans, sales and advances, and claimed that the demands, for the reasons alleged, were not provable. The second plea differs from the first only in that it alleges that E. L. Hawley was also a member of the claimant firm.

The plaintiff demurred to both pleas and the case comes here upon the judgment of the court below overruling the demurrer and adjudging the pleas sufficient.

The only question presented is, whether the assignee of one insolvent firm composed of the three or four persons named in the pleas can prove a claim against another insolvent firm which is composed of two of the members of the claimant firm. It must be understood by the pleas that the claimant firm was engaged in a business separate and distinct from that of the defendant.

The claim that is sought to be proved is a debt due to the firm of S. F. Prince & Co. from the firm of D. L. Kent & Co., and therefore is not affected by the rule that a partnership firm cannot prove a claim against the individual estate of an insolvent partner, nor by the rule that a member of a firm cannot prove a claim against the firm of which he is a member. The case presents no question as to the liability of the property of individual members of the defendant firm for the payment of the claim, nor of the right of individual members of the claimant firm to share in the assets of the defendant. Whatever dividend may be received for the claimant firm will not be for the benefit of its individual members nor for their creditors, but for the benefit of the creditors of the claimant firm.

Section 2164, V. S., provides that the net proceeds of the property of the insolvent partnership shall be appropriated to the payment of the creditors of such partnership, and that the net proceeds of the separate estate of each partner shall be appropriated to the payment of his separate

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creditors, which is for the reason that credit was presumably given by partnership and private creditors, respectively, by reason of their reliance upon partnership and private assets, which, by the credit given, they have respectively increased. This statute is founded upon the equitable rule given by Lord Hardwicke in *Twiss* v. *Massey*, 1 Atk. 67, that joint creditors, as they gave credit to the joint estate, have first their demand on the joint estate; and separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate.

The firm of S. F. Prince & Co. being a creditor of the defendant, and all dividends recovered being for the claimant's creditors, the claim is provable. This holding is in accordance with *Somerset Potters Works* v. *Minot*, 10 Cush. 592, and the other Massachusetts cases cited by counsel, decided under a statute like our own, also with the elementary works upon partnership, cited.

Judgment reversed; demurrer sustained; pleas adjudged insufficient and cause remanded.

OTIS F. SMITH *vs.* ROBERT M. JOHNSON.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Slander—Plea in Justification.

To a declaration in slander a plea is insufficient which states merely that the defendant believed the words to be true, when from their nature he must have known whether they were true or false.

ACTION ON THE CASE for slander. The defendant filed a special plea to which the plaintiff demurred generally.

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Heard on demurrer at the September Term, 1896, Rutland County, *Rowell*, J., presiding. *Pro forma* judgment overruling the demurrer and adjudging the plea sufficient. The plaintiff excepted.

The declaration alleges that the slanderous words were spoken concerning the plaintiff in his office of Justice of the Peace with the meaning that the plaintiff had received the money, liquor and gloves with the corrupt understanding that he should favor the defendant in prosecutions before the plaintiff for violation of the law against liquor selling. The plea admits the speaking of the words in the sense charged, but attempts to justify their use by alleging that they were spoken without malice and with a belief in their truth by way of answer to one who inquired of the defendant concerning the plaintiff's fitness to hold the said office, the plaintiff then being a candidate for appointment thereto. The words charged are recited in the opinion.

W. H. Button and *C. M. Wilds* for the plaintiff.

The defendant was bound either to deny the speaking of the words or to allege their truth. He has done neither. The fact that the plaintiff was a candidate for public office would have justified criticism but did not justify a distinct charge of crime. The defendant was bound to know whether the charge was true. This distinction is made clear by a long line of cases showing the growth of the law. *Clarges* v. *Rowe*, 3 Lev. 30; *How* v. *Prin*, 7 Mod. 107; *Harwood* v. *Astley*, 4 Bos. & Pul. 47; *Davis* v. *Shepstone*, 11 App. Cas. 187; *Com.* v. *Clap*, 4 Mass. 163; *Brewer* v. *Weakley*, 2 Overt. 99; *Seely* v. *Blair*, Wright 358; *Mayrant* v. *Richardson*, 1 Nott & McCord 347; *Aldrich* v. *Printing Co.* 9 Minn. 133; *Lewis* v. *Few*, 5 Johns. 1; *Root* v. *King*, 7 Cow. 613; *King* v. *Root*, 4 Wend. 113; *Hamilton* v. *Eno*, 81 N. Y. 116; *Rowand* v. *DeCamp*, 96 Pa. St. 493; *Bailey* v. *Kalamazoo Pub. Co.*, 40 Mich. 254; *Bronson* v. *Bruce*, 59 Mich. 467; *Curtis* v. *Mussey*, 6 Gray 261; *Burt* v. *Newspaper Co.*, 154 Mass. 238.

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Butler & Moloney for the defendant.

It is admitted by the demurrer that the defendant spoke the words without malice, with good reason to believe, and with actual belief, in their truth. They were spoken concerning the plaintiff's fitness for a public office for which he was a candidate, and spoken by way of answer to an inquiry made by one whose support had been solicited by the plaintiff. The communication was, therefore, privileged. Odger, Libel, 198–212; *Shurtleff* v. *Stevens*, 51 Vt. 512; II Green. Ev. 421; *Carpenter* v. *Willey*, 65 Vt. 176; *Clemmons* v. *Danforth*, 67 Vt. 617; *Posnett* v. *Marble*, 62 Vt. 488; *Nott* v. *Stoddard*, 38 Vt. 26.

TAFT, J. The question before us is as to the sufficiency of a plea to the declaration. It is alleged in the declaration that the defendant maliciously spoke of the plaintiff that he, the defendant, had paid the plaintiff five dollars, and what liquor the plaintiff wanted from a pint to a quart a month while Curley Parker was in his saloon; that he, the defendant, had enclosed a ten dollar bill in a letter, mailed to the plaintiff, that he took a five dollar bill out of his pocketbook and put it into a new pair of gloves which Curley Parker had and gave to the plaintiff, and that he did these things for his protection.

The defendant alleges in his plea that he spoke the words with no malice whatever, and that he had good reason to and did believe that said words were true. The defendant knew whether the words of the libel were true or false. He had knowledge thereof because they related to acts which he states that he did; whether he did the acts or not were facts within his knowledge,—and belief in respect to it is not predicable of knowledge.

The plea is defective in not alleging the truth of the words. If these matters related to acts done by third parties, the plea in its present form might be sufficient under the ruling in *Posnett* v. *Marble*, 62 Vt. 488, but upon the facts stated in the declaration, the plea is defective. The defendant can

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only stand upon the truth of the words alleged. He must therefore plead their truth. The demurrer should have been sustained and plea adjudged insufficient.

The pro forma judgment reversed and cause remanded.

EUGENE L. WESTCOTT *vs.* THE ESTATE OF DANIEL P. WESTCOTT.

October Term, 1896.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Parent and Child—Compensation for Services—Wife of Party in Interest as a Witness—Exclusion of Question Unaccompanied by Offer—Evidence.

An adult son residing with his father and doing him valuable service may be entitled to compensation without an express promise, if the circumstances justify the inference that both parties expected the services would be paid for. In the present case the evidence warranted the submission of the question to the jury.

When a claim is presented against a decedent's estate and the estate is solvent, the residuary legatee is a party in interest, and his wife is incompetent as a witness.

Error will not be predicated upon the exclusion of a question when there is nothing to show what the answer would have been.

The defendant offered to show that the plaintiff, just before he returned to his father's, was in want, unable to make a living and asked assistance, in consequence whereof the father sent him money to enable him to return. The evidence was excluded. *Held*, error, since it would have tended to explain the circumstances disclosed by the plaintiff's testimony and rebut the inference to be drawn therefrom.

APPEAL from the Probate Court for the District of Fair Haven. Declaration, general assumpsit. Plea, the general issue. Trial by jury at the March Term, 1896, Rutland County, *Taft*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

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The declarations of the decedent, referred to in the opinion, were to the effect that he had sent for the plaintiff to come home and work on the farm for the reason that he could do better there than in the West where he had been.

The plaintiff requested the court to instruct the jury that there was no evidence from which they could infer any expectation that the plaintiff should be paid for his services beyond the value of the board of himself and family. The court ruled that there was such evidence, and the defendant excepted.

Henry A. Harman and *Butler & Moloney* for the defendant.

No legal principle is better established than this, that when a child, after attaining his majority, returns to live with his parents and becomes one of the family, a relation of debtor and creditor does not thereby arise, such as to warrant a claim for services rendered to such parents. *Fitch* v. *Peckham*, 16 Vt. 150; *Andrus* v. *Foster*, 17 Vt. 556; *Cobb* v. *Bishop*, 27 Vt. 624; *Way* v. *Way*, 27 Vt. 625; *Davis* v. *Goodenow*, 27 Vt. 715; *Sprague* v. *Waldo*, 38 Vt. 141; *Harris* v. *Currier*, 44 Vt. 468; *Doane* v. *Doane*, 46 Vt. 485; *Ashley* v. *Hendee*, 56 Vt. 209; *Sawyer* v. *Hebard's Est.*, 58 Vt. 375.

While it is not necessary to prove an express promise to pay, the evidence must establish a mutual expectation of payment as contrasted with compensation in some other way. This, in the case at bar, the evidence failed to do.

But if the court did not err in submitting the case to the jury it certainly erred in not admitting the evidence of the defendant which tended to explain the circumstances under which the plaintiff returned to the father's house.

The testimony of Jennie Westcott should have been received. Her husband, though residuary legatee, was not a party to the action. He was interested in the event of the litigation, but our statute has abolished disqualifications for interest. This judgment could not be used for or against

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him in a subsequent case, which is the true test. *Labaree* v. *Wood*, 54 Vt. 452.

W. H. Preston and *F. S. Platt* for the plaintiff.

The exclusion of testimony that the deceased sent his son money to enable him to return, was proper. There was no claim in offset.

The wife of the residuary legatee,—the estate being solvent —was incompetent. *Carpenter* v. *Moore*, 43 Vt. 392; *Wheeler* v. *Wheeler's Est.*, 47 Vt. 637; *Labaree* v. *Wood*, 54 Vt. 452; *Banister* v. *Ovitt*, 64 Vt. 580.

There was evidence to support the plaintiff's main claim. *Freeman* v. *Freeman*, 65 Ill. 106; *Markey* v. *Brewster*, 10 Hun, 16; *Andrus v. Foster*, 17 Vt. 556. The important fact is that the plaintiff returned to work at the father's request. *Hart* v. *Hart's Admr.*, 41 Mo. 441; *Koch* v. *Hebel*, 32 Mo. App. 103; *Green* v. *Roberts*, 47 Barb. 521; *Portlow* v. *Cooke*, 2 R. I. 451; *Adams* v. *Adams*, 23 Ind. 50.

START, J. The question of whether there was any evidence tending to support the plaintiff's claim is presented for consideration by the defendant's request to charge. The plaintiff's evidence tended to show, that he was a son of the deceased, David Potter Westcott; that, after he became twenty-one years of age, he left his father's home, where he had formerly resided, and went to Michigan, where he was married and spent a few years; that his father sent for him to come home; that his father stated he had a good deal of land and the plaintiff had better come home to work on the farm, as he could do better here than in the west; that he did come home and become an inmate of his father's house and perform various kinds of labor upon his father's farm, such as haying, harvesting, milking, teaming, drawing wood, etc., for his father's benefit; that his services were worth from eighteen to twenty dollars per month.

While this testimony did not tend to show an express promise on the part of the father to pay for the services of

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the son, we think the circumstances under which the son returned to his father's home, after being away for several years, and the circumstances under which he thereafter continued to live with his father and perform services for his father's benefit, taken in connection with the father's declarations and statements, were for the consideration of the jury upon the question of whether there was a mutual understanding and expectation that the services were to be paid for; and that the case was properly submitted to the jury.

If the parties mutually understood and expected that the services were to be paid for, the relation of debtor and creditor existed; and, if the jury so found, the plaintiff was entitled to recover the balance due him for his services. It was not necessary to show an express agreement to pay. It was sufficient to show that the father expected to pay for the services and that the son expected payment; and such expectation could be shown by the circumstances under which the services were performed, the situation and surroundings of the parties, their pecuniary circumstances, and the declarations of the party sought to be charged.

In *Sawyer* v. *Hebard's Est.*, 58 Vt. 376, it is said: "An examination of these cases shows that no definite rule has been, or can be, laid down, in regard to what the circumstances must be, to show mutual expectation to pay for such services, or support, and that each case, in this respect, is made to turn largely upon its own peculiar circumstances."

In *Doane* v. *Doane and Trustee*, 46 Vt. 485, the son had means in his hands belonging to his father, with which, if paid over, the father could provide his own support. The son furnished the support, and it was held that these circumstances would "help the implication that it was to be paid for."

In *Freeman* v. *Freeman*, 65 Ill. 106, it is held, that, when a son, some time after reaching his majority, left his parents and commenced business on his own account and was

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afterwards induced by his father to return, all his other sons having left him, and he continued to labor for his father for many years, managing his affairs and supporting his parents, for which he received nothing but his board, scanty clothing and a little spending money, it was but reasonable to presume that the father intended to pay, and the son to receive pay, for his labor, either in money or by devise in his father's will.

The witness, Jennie Westcott, was properly excluded. Her husband was the residuary legatee and devisee named in the will of David Potter Westcott. The estate was solvent, and a recovery in this case would directly dimish the sum he would otherwise take under the will. He was, therefore, a party in interest, and his wife was not a competent witness. *Banister* v. *Ovitt*, 64 Vt. 580.

The defendant made no offer in connection with the testimony of Heman Stannard, and it does not appear what his answer would have been respecting the loan of money to the plaintiff, if it had been given; therefore, error does not appear. *Roach* v. *Caldbeck*, 64 Vt. 593.

The defendant, after showing the loss of certain letters written by the plaintiff to his mother and shown by her to the deceased, offered to show that the plaintiff wrote in these letters that he was in want, needed money, was unable to make a living, and asked for assistance; that, in consequence of the information received, and with a view of relieving the plaintiff's wants, the deceased sent him one hundred dollars, to enable him to return to his former home in the family of the deceased; and that the plaintiff shortly afterwards did return. This testimony was excluded and the defendant excepted. This testimony, if admitted, would have tended to show the plaintiff's necessities, his situation and circumstances while in the west and just before he came to his father's house, the reason for his coming, the circumstances under which he entered his father's family, and explain and rebut the circumstances disclosed by the

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plaintiff's evidence. It was admissible upon the issue respecting the mutual understanding and expectation of the parties, and it was error to exclude it; and, for this error, a new trial must be granted.

Judgment reversed and cause remanded.

WELCH & DARLING *vs.* B. M. & IRA O. RICKER.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Evidence—Separate Transactions.

The defendant could not show that he did not promise to pay the plaintiff for the goods in question by showing that he afterwards promised to pay the plaintiff for certain other goods and kept that promise.

The plaintiffs claimed that the goods were sold upon the representation of B. M. Ricker that he was jointly interested with the defendant Ira O. Ricker in the management of the farm for which they were purchased. The plaintiffs should, therefore, have been permitted to show that he was in fact thus interested by showing that he hired, paid and directed laborers upon the farm.

The plaintiffs having explained their method of bookkeeping and produced their books showing separate entries of the goods in question, were not entitled to characterize one of such entries as "the only charge."

GENERAL ASSUMPSIT. Plea the general issue. The defendant, Ira O. Ricker, being in insolvency, the case proceeded against B. M. Ricker alone. Trial by jury at the June Term, 1896, Caledonia County, *Ross*, C. J., presiding. Verdict and judgment for the defendant. The plaintiffs excepted.

With respect to the exception last mentioned in the opinion, the record shows that the plaintiffs offered to have the plaintiff Welch testify "that the ledger was the only

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book upon which the plaintiffs charged such goods as were not paid for." The court permitted the plaintiffs to show how the books were kept, but ruled that the witness could not state that the ledger entry was the only charge, and excluded the offer; to which the plaintiffs excepted.

Dunnett & Slack for the plaintiffs.

Bates & May for the defendants.

THOMPSON, J. The defendant, Ira O. Ricker, being in insolvency, the case in the court below proceeded against the defendant, B. M. Ricker, alone. The plaintiffs sought to recover for the price of a quantity of feed delivered to Ira O. Ricker by virtue of certain representations made prior to delivery, by B. M. Ricker, as the plaintiffs claimed, which rightly gave them to believe and understand that he would become jointly responsible with Ira O. for the payment thereof. The defendant, B. M. Ricker, denied having made such representations and his liability to pay for the goods. The feed was delivered from time to time from November, 1892, to November, 1894. Late in the fall of 1894, the defendant, B. M. Ricker, denied his liability to the plaintiffs and refused to pay for the feed which had been delivered to Ira O., but then agreed to pay for all feed which they might thereafter furnish him. As tending to controvert the claim of the plaintiffs, that he had ever acknowledged any liability on his part, for the feed in controversy, he was permitted to show, under the exception of the plaintiffs, that on July 17, 1895, he paid them for all the feed which they furnished to Ira O. under the agreement made in the fall of 1894. This agreement and transaction had no connection with the one under which it was claimed the account in suit accrued. By the ruling under which this evidence was admitted, the jury might well have understood that they had a right to infer and reason thus: the defendant always pays as he agrees, because he paid pursuant to his agreement in the fall of 1894; he did not pay for the feed delivered prior to that

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agreement, but refuses so to do, therefore he did not promise to pay as alleged by the plaintiff.

Inferences are not to be drawn from one transaction to another that is not specificially connected with it merely because the two resemble each other; they must be linked together by the chain of cause and effect in some assignable way before an inference can be drawn. Stephen's Dig. Ev. (May's ed.) 55, art. 10; Id. 206, note VI. No inference in respect to the alleged agreement in controversy could legitimately be drawn from the fact that the defendant had performed another contract about which there was no dispute. Hence it was error to admit this evidence for the specific purpose stated. *Boyden* v. *Brookline*, 8 Vt. 284; *Phelps* v. *Conant*, 30 Vt. 277; *Bishop* v. *Wheeler*, 46 Vt. 409; *Hitt* v. *Slocum*, 37 Vt. 524; *Harris* v. *Howard's Est.*, 56 Vt. 695; *Aiken* v. *Kennison*, 58 Vt. 665; *Jones* v. *Ellis' Est.*, 68 Vt. 544.

The exception to the refusal of the court below to order the defendant to produce his book of accounts, showing his deal with Ira O., cannot be sustained, as the record shows that the book was produced, submitted to the plaintiffs, and the defendant examined in respect to the same. The record does not disclose that this was not all done before the close of the cross-examination of the defendant.

The defendant B. M. Ricker testified that the control and management of the farm sold by him in 1889 to his son, Ira O. Ricker, and on which the latter lived while the account in controversy was accruing, was the same for the years 1893 and 1894 down to 1895. The plaintiffs offered to show by D. R. Darling that he worked on the farm during the winter of 1894 and 1895, after the dispute between them and B M. Ricker, and after they had begun to furnish feed on his special promise to pay for the same, and that he was on the farm and hired Darling, directed his labors and paid him. This evidence was excluded, to which the plaintiffs excepted.

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The evidence of the plaintiffs tended to show that as a part of the representations made to him by B. M. Ricker, under which they furnished the feed on the joint credit of himself and Ira O., he made such representations as gave them the right to understand and believe that he was jointly interested with Ira O. in the management and control of the farm. If this were true, it rendered more probable the claim of the plaintiffs that he agreed to become jointly liable with Ira O. for the feed. In view of the testimony of B. M. Ricker in respect to the control and management of the farm during the years 1893 and 1894, the evidence excluded tended to show that he was jointly interested with Ira O. in the control and management of the farm, and it was error to exclude it. *Armstrong* v. *Noble*, 55 Vt. 428; *Tenney* v. *Harvey*, 63 Vt. 520; *State* v. *Burpee*, 65 Vt. 1.

We fail to discover any error in respect to permitting the plaintiffs to testify about the charging the feed on their books. The books were produced and the entries shown. The plaintiffs were allowed to testify fully as to their method of keeping their books, and how it happened that on the memorandum or sales book, the feed was charged to Ira O. Ricker, while on the ledger it was charged to Ira O. and B. M. Ricker. Neither entry was conclusive as to whom the credit was in fact given at the time of the delivery of the goods. *Scott* v. *Shipherd*, 3 Vt. 104; *Goodrich* v. *Drew*, 10 Vt. 137. The plaintiffs were permitted to show that they in fact sold the goods on the joint credit of both the Rickers. It was for the jury to say whether the plaintiffs' books as kept, corroborated their claim.

Judgment reversed and cause remanded.

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JOHN D. WATSON, admr. *vs.* LYDIA J. WATSON.

October Term, 1896.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Gift of Savings Bank Book.

A valid gift of a savings bank deposit book may be made by delivery alone without written assignment.

The administrator of the donor is not entitled to the possession of the book even for the purpose of bringing an action thereon against the bank, for such an action would be subject to the control of the donor.

TROVER for a savings bank deposit book. Plea, not guilty. Trial by court at the March Term, 1895, Windham County, *Rowell*, J., presiding. Judgment, upon the facts found, for the defendant. The plaintiff excepted.

The intestate died in 1880. Sometime before, she delivered the book in question to the defendant with directions to keep it and permit the deposit to remain until the plaintiff, a son of the intestate, was dead and then to divide the deposit among her other children. The defendant accepted and has ever since held the book for that purpose.

On September 6, 1894, the plaintiff was appointed administrator upon the intestate's estate and before commencement of this action demanded the book of the defendant, and the defendant refused to deliver it. The book was never assigned except by delivery. It contained a printed copy of a by-law of the bank as follows: "When any person shall receive either principal or interest his original deposit book shall be produced that the payment may be entered therein; but in case of sickness or absence the money may be paid to the written order of the depositor accompanied by the said book."

Waterman, Martin & Hitt for the plaintiff.

There was no completed gift. *Shurtleff* v. *Frances*, 118

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Mass. 154; *Cummings* v. *Bramhall*, 120 Mass. 552; *Phipps* v. *Hope*, 16 Ohio St. 586.

V. S. 4034 provides for the withdrawal of deposits by depositors "or their legal representatives under such regulations as the board of trustees prescribes, printed on the pass book" etc. The book in question contained a requirement of a written assignment in case the book should be presented by any one other than the depositor, or his legal representative. *Gifford* v. *Savings Bank*, 63 Vt. 108. A mere delivery of the book without notice to the bank or the donees conveys no property. The plaintiff is the only person entitled to sue the bank for the deposit. The rights of claimants to the fund can be adjusted afterwards.

The intestate might have recalled the book from the defendant. So may her administrator. A declaration of intention is not a gift. A gift must be irrevocable. *Pope* v. *Savings Bank*, 56 Vt. 284; *Northrop* v. *Hale*, 73 Me. 66; *Dole* v. *Lincoln*, 31 Me. 428; *Taylor* v. *Henry*, 48 Md. 550; II Kent's Com. 438.

K. Haskins and *John H. Watson* for the defendant.

That a gift may be made to a third person in trust is well settled. *Williams* v. *Haskins' Est.*, 66 Vt. 378.

Delivery was enough to perfect the gift. *Hackett* v. *Moxley*, 65 Vt. 71; *Ridden* v. *Thrall*, 125 N. Y. 572: 21 Am. St. 758; *Pierce* v. *Savings Bank* and *Turner* v. *Estabrook*, reported together, 129 Mass. 425: 37 Am. Rep. 371; *Hill* v. *Stevenson*, 63 Me. 364: 18 Am. Rep. 231; *Camp's Appeal*, 36 Conn. 88: 4 Am. Rep. 39; *Grover* v. *Grover*, 24 Pick. 261; *Tillinghast* v. *Wheaton*, 8 R. I. 536: 94 Am. Dec. 126; *Wyble* v. *McPheters*, 52 Ind. 393.

THOMPSON, J. The question determinative of this case, is whether or not the delivery of her deposit book by the plaintiff's intestate to the defendant, was a consummated gift of the bank deposit to the defendant in trust as stated in the finding of facts. In savings banks in this State, such

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deposit books are issued to the depositors as evidence of the indebtedness of the banks. Withdrawals of deposits are entered in the same books, so that the deposit book always, with the addition of interest, shows the actual state of the accounts between the bank and the depositor, and the entire indebtedness of the bank. The general rule in this country and England, is that the delivery of property which transfers to the donee either the legal or equitable title, is sufficient to effectuate a gift; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages, or certificates of stock, is sufficient to effectuate a gift. The deposit book in the case of a savings bank, answers the same purpose as a certificate of deposit in the case of other banks. In this case, the delivery of the deposit book to the defendant, consummated the gift, and no other formality was necessary to constitute the actual delivery of the bank deposit, and vest the possession and title in the donee. *Grover, Admr.* v. *Grover*, 24 Pick. 261; *Pierce* v. *Savings Bank*, 129 Mass. 425: 37 Am. Rep. 371; *Camp's Appeal*, 36 Conn. 88: 4 Am. Rep. 39; *Hill* v. *Stevenson*, 63 Me. 364: 18 Am. Rep. 231; *Ridden* v. *Thrall*, 125 N. Y. 572: 21 Am. St. Rep. 758; *Tillinghast* v. *Wheaton*, 8 R. I. 536: 94 Am. Dec. 126; *Hackett* v. *Moxley*, 65 Vt. 71.

In case the donor is living, the donee can maintain an action against the savings bank for the deposit, in the name of the donor; if the donor is dead, the action can be brought by the donee in the name of the donor's administrator. *Pierce* v. *Savings Bank*, 129 Mass. 425. In either event the suit would be controlled by the donee and the recovery had for his benefit. Hence the plaintiff's contention that he is entitled to the deposit book to collect the deposit, even though it belongs to the defendant, cannot be maintained.

Judgment affirmed.

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THE FAIR HAVEN MARBLE AND MARBLEIZED SLATE CO. et al. *vs.* SARAH D. OWENS et al.

January Term, 1896.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Deed Fraudulent as to Creditors—Inoperative without Delivery—Sufficiency of Consideration.

The conveyance by a debtor of his attachable property without consideration and without adequate provision made for the payment of debts, is, as to creditors, fraudulent and void.

In the absence of actual intent to defraud, such a conveyance will be set aside only to the extent necessary to protect creditors.

Where one party to a contract makes voluntary advancements to the other to enable him to carry it out, such advancements are to be treated as debts accruing when made and not as relating back to the date of the contract.

The moral obligation arising from services performed by members of one's family without a contract for payment, is not a valid consideration for a conveyance which leaves the grantor without sufficient property to pay his debts.

The grantor made a deed and caused it to be recorded, but never delivered it to the grantees, nor to any person for them, and it was found among his papers after his death. *Held*, inoperative.

BILL IN CHANCERY, by creditors of Owen Owens, to set aside as fraudulent and void certain conveyances made by their debtor to the defendants. Heard by *Taft*, Chancellor, on report of a master at the March Term, 1896, Rutland County. The conveyances mentioned in the decree at the end of the opinion were adjudged fraudulent and void, and the defendants ordered to reconvey to the executors of Owen Owens for the benefit of his creditors. Both parties appealed.

Owen Owens was a partner in the firm of Owen Owens & Co., the other members of which were of no financial responsibility. February 16, 1882, the firm made a contract

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with the orator, the Slate Company, under which the firm was to quarry and deliver to the Slate Company stone at a stipulated price. The Slate Company was not bound to pay for the stone until it had been measured, but for the purpose of enabling the firm to carry on its part of the contract, adopted the practice of making advancements of money, which formed a balance against the firm increasing from year to year. If these advancements were treated as constituting a debt under the contract, as of the date of the contract, then certain of the conveyances were found to leave the grantor, Owen Owens, without adequate property to pay his debts; whereas, if the advancements were treated as debts accruing as they were made, said conveyances left the grantor with sufficient assets.

W. H. Preston, *H. A. Harmon* and *F. S. Platt* for the orators.

Joel C. Baker for the defendants.

THOMPSON, J. It is contended that the final balance found due the orator, The Fairhaven Marble and Marbleized Slate Co., must be considered as having existed since February 16, 1882, the date of its contract with Owen Owens, deceased, for the purpose of determining the validity of his conveyances and assignments of his property to the defendants, who are his daughters. By the stipulation filed as supplementary to the master's report, it is conceded that no part of that final balance is for damages accruing from a breach of the contract by Owen Owens, but the balance is for money advanced to him from time to time to enable him to carry on the contract. The contract did not provide for such advances, and they cannot be considered as a part of the performance of it. Hence, it is not necessary to decide whether an indebtedness resulting from the performance of a contract according to its terms, relates back to the date when such contract became operative, so far as the right of such debtor to dispose of his property to the detriment of

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the creditor, is concerned. In this case, the indebtedness only dates from the time when the advancements were made.

As against creditors, the moral obligation arising from the services performed by the daughters of Owen Owens while members of his family, without contract or agreement that they should be paid therefor, is not a sufficient consideration for the transfer of a part of his property to them, without retaining sufficient property to pay his debts then owing. *Updike* v. *Titus*, 13 N. J. Eq. 151. The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brother, step-children, or other relations. In the absence of a contract or agreement to pay for them, no action can be maintained for such services. *Updike* v. *Titus*, *supra*; *Fitch* v. *Peckham*, 16 Vt. 150; *Cobb* v. *Bishop*, 27 Vt. 624; *Davis* v. *Goodenow*, 27 Vt. 715; *Putnam* v. *Town*, 34 Vt. 429; *Sprague* v. *Waldo*, 38 Vt. 139; *Ashley* v. *Hendee*, 56 Vt. 209; *Sawyer* v. *Hebard*, 58 Vt. 375 and cases there cited; *Ormsby* v. *Rhoades*, 59 Vt. 505; *Hatch* v. *Hatch*, 60 Vt. 160.

The deed of the dwelling house and lot and of the brick block, executed May 25, 1885, although recorded by the grantor, was never delivered by him to the grantees nor to any person for them, but was found among his papers after his death. The fact that a deed is on record is only *prima facie* evidence of a delivery, which may be rebutted, and which, in the case at bar, is explicitly negated by the facts found. A deed does not take effect until it is delivered. So long as the grantor retains the control of the deed, he retains the title. *Elmore* v. *Marks*, 39 Vt. 538; *Walsh* v. *Vt. Mut. Fire Ins. Co.*, 54 Vt. 351; *Dwinell* v. *Bliss*, 58 Vt. 353. Hence the grantees took nothing by virtue of the deed executed May 25, 1885.

The conveyance by a debtor of his attachable property, without consideration, and without making adequate provisions for the payment of his debts, is fraudulent and

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void as to his creditors. Such fraud on the part of the debtor may be an actual fraudulent purpose to cheat and defraud his creditors, or it may be constructive fraud, which is fraud that the law imputes to him from the condition of his estate and the necessary consequence of his act in respect to his creditors. The effect of both these kinds of fraud, in respect to creditors, in the case of a voluntary conveyance by the debtor, without consideration, was so fully discussed in the recent case of *Wilson* v. *Spear*, 68 Vt. 145, that it does not require further discussion here.

In the case at bar, the master fails to find an actual fraudulent purpose on the part of Owen Owens to defraud his creditors, by making the respective conveyances and transfers of his property to his daughters. No actual fraud being found, such conveyances will be sustained as were made at a time when he retained sufficient property to pay the debts which he then owed. *Brackett* v. *Waite*, 4 Vt. 389; *Dewey* v. *Long*, 25 Vt. 564; *Church* v. *Chapin*, 35 Vt. 223; *Wilbur* v. *Nichols*, 61 Vt. 432; *Wilson* v. *Spear*, 68 Vt. 145.

At the time of the conveyance of July 9, 1883, of the house and lot to the defendant Kate L. Humphrey, and of the execution and delivery of the mortgage of May 25, 1885, to the defendant Sarah A. Owens, Owen Owens retained ample property to pay all his then existing debts, and these conveyances are, therefore, valid as against his creditors.

In respect to the other conveyance and assignments of property by Owens to the defendants or either of them, it must be held that they are invalid as to his creditors to the extent of their existing debts, as he did not at the time of making them retain sufficient property to pay such debts. Except in this respect, such conveyance and assignments are valid, and they must be set aside only to the extent of satisfying the debts specified.

The decree is reversed, and cause remanded to the court of chancery to the end that a decree may be made as follows:

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(1) That the deed mentioned in the special master's report in this cause, made by Owen Owens, deceased, May 25, 1885, to the defendants, Ellen E. Thomas, Jane E. Jones, Kate L. Humphrey and Sarah A. Owens, was and is inoperative and void by reason of the non-delivery thereof by the grantor to the grantees therein named, and that said defendants and their husbands, defendants, execute and deliver to the defendants, Sarah A. Owens and Jane E. Jones as executrices of the will of said Owen Owens, deceased, or to their successors in said trust, such conveyance in trust for said estate, as may be necessary to remove the cloud from the title to the real estate described in said deed.

(2) That the conveyance of October, 22, 1885, and the assignments of mortgages made June 2, 1885, to the respective defendants, as stated in said master's report, are void as to the creditors of said Owen Owens, deceased, to the extent of the deficiency of the assets of his estate to pay the debts against his estate, owing at the time said conveyance and assignments, respectively were made.

(3) That said executrices or their said successors, have the power of sale and the right to convey so much of said real estate conveyed October 22, 1885, to the same effect as if said conveyance had not been made, as shall be necessary to make up such deficiency of assets, and that all necessary and proper orders may be made, and proceedings had for carrying into effect such decree by such sale, unless the defendant, Jane E. Jones, shall make up such deficiency, by paying to said executrices or their successors in said trust, the amount of such deficiency; and that when such sale shall have been made by said executrices or their said successors, the defendants, Jane E. Jones and her husband, Hugh T. Jones, be decreed to make proper and effectual conveyance of the portion so bargained and sold.

(4) That the defendants to whom said mortgages were assigned June 2, 1885, respectively account for and pay over to said executrices or their successors, all money which they

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collected thereon, to the extent of the deficiency of the assets of the estate of said Owen Owens to pay the debts against it, owing at the date of the assignment of such mortgages.

(5) That each and every one of said defendants account for and pay over to said executrices or their said successors, all and singular, the rents, income, profits and interest received by any of said defendants respectively, derived from the assignment of said mortgages, and said real estate, adjudged to have been assigned and conveyed in fraud of the rights of creditors, after deducting all taxes paid by the defendants, or either of them, on said property, personal and real, to the extent of the deficiency of assets of the estate of said Owen Owens as herein before stated.

(6) That the orators recover costs of suit, and have execution therefor.

(7) That the cause be retained in the court of chancery, for effectuating all matters embraced in the premises.

ELECTA BOURNE *vs.* MONTRAVILLE A. BOURNE, executor, and ELLEN BOURNE.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Exceptions to Master's Report—Reviver of Mortgage for Benefit of one with whose money it was paid.

Objections taken to evidence before a master must be renewed by exceptions filed to the report in the court of chancery in order to be considered here.

The oratrix conveyed to her son, and took back a life lease, upon the oral agreement that he should support her. She afterwards joined with him in a conveyance of the property, the proceeds being declared by him to

be held as the land had been. He used them to pay off a mortgage upon other land and died insolvent. *Held*, that the mortgage should be revived and foreclosed for the benefit of the oratrix, her right being superior to that of a creditor whose debt was not incurred in reliance upon the mortgage having been paid.

BILL IN CHANCERY. Heard on the report of a master at the March Term, 1896, Rutland County. *Taft*, Chancellor, decreed that the defendants should convey the Engrem premises to the oratrix unless they should elect to pay her the amount withdrawn from the savings bank by Charles E. Bourne, and that in the event of such election the Engrem mortgage should be revived and foreclosed for the enforcement of such payment. The defendant Ellen Bourne appealed.

The facts are recited in the opinion.

Joel C. Baker for the oratrix.

Under the master's findings the deed and contemporaneous lease were testamentary papers only. *Carleton* v. *Cameron*, 54 Tex. 721: 38 Am. Rep. 620 and note; *Thrall* v. *Spear*, 63 Vt. 273. If not, the property was held as security.

The money received upon the sale of the homestead merely took the place of the land and was impressed with the same trust. Charles E. Bourne attempted to execute the trust by devising the Engrem premises to the oratrix. Although he failed in this method, the court should give effect to the trust. I Perry, Trusts, § 98; *Savings Institution* v. *Hathorn*, 88 Me. 122: 51 Am. St. Rep. 389, note; *Savings Bank* v. *Albee*, 64 Vt. 574; *Janes* v. *Falk*, 50 N. J. Eq. 468; *Goldsmith* v. *Goldsmith*, 145 N. Y. 316; *Williamson* v. *Yager*, 91 Ky. 282, note: 34 Am. St. Rep. 189.

Butler & Moloney for the defendants.

The defendant, Ellen Bourne, is a creditor as well as the widow of the testator. The will is ineffective as against creditors. It is not certain that the attempted devise was intended as a recognition of a trust.

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The parole testimony was improperly received to vary the contract shown by the deed and lease.

Although Charles E. Bourne expressed an intention that the oratrix should have the benefit of the money received from the sale of the place he never acknowledged her right to it. At least the amount of the note which he had received from the oratrix and her husband should be deducted and she would only be entitled to the income, not to the principal, of the balance.

The facts do not make a case for subrogation. *Gerrish* v. *Bragg*, 55 Vt. 337. The Engrem mortgage had been paid and discharged. *Bartlett* v. *Wade*, 66 Vt. 631.

ROWELL, J. Before and on June 26, 1879, Edmund Bourne, the oratrix's husband, who died in July, 1879, owned a place in Danby, where they lived. On that day, by a warranty deed of that date in common form, they conveyed the same to the testator, Charles E. Bourne, their son, for the expressed consideration of a thousand dollars, and Charles gave them back a lease thereof "for and during the term of their natural lives and the survivor of them." It is found from oral testimony seasonably objected to by the defendant Ellen, who is the widow of Charles, that Charles paid nothing for said deed at the time, and that it was not intended to evidence an absolute sale to him, but was only to secure him for what he had already done, or might thereafter do, for his father and mother; that it was expected she would continue to live on the place and be supported principally by Charles, and that her support would at least equal the value of the place, which would belong to Charles when she was dead. This arrangement was known to the other members of the family, and acquiesced in by them.

The objection to the admission of this oral testimony cannot be availed of here, as it does not appear that an exception to the report for that reason was filed in the court of chancery. V. S. 942 The arrangement found therefrom must, therefore, stand for what it is legally worth.

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The oratrix continued to live on the place till sometime in 1885, and was supported by her children, including Charles, who severally contributed what they saw fit. Whether Charles' contributions were regarded as a legal claim against her, any more than the contributions of her other children, does not appear, unless it is shown by the conveyances and the arrangement aforesaid.

On January 6, 1886, the place was sold for eleven hundred dollars, the oratrix joining in the deed. Charles had the money, and deposited it in a savings bank in his name. In 1887 he drew it from the bank and paid most of it on a purchase-money mortgage that he had given on two lots in the Village of Rutland, which he had previously bought of Engrem. On January 26, 1891, Charles borrowed six hundred dollars of his brother, the defendant Montraville, who is executor of Charles' will, and with that and other money, paid the balance due on the Engrem mortgage, which was then discharged of record, and thereupon he gave Montraville a mortgage on said lots for six hundred dollars, which is still a lien thereon.

After the place in Danby was sold, the oratrix lived awhile with one of her daughters, and later with her son, Montraville, who has supported her for several years. It does not appear that Charles, who died July 2, 1892, contributed anything to her support after she left Danby, nor that he paid her any interest on the money in his hands; but he frequently said that he considered the money subject to said arrangement, and intended that his mother should have the benefit of it to the same extent as though it was the family homestead in Danby, and that he had arranged his affairs so that she would be protected if he should be taken away. The only arrangement he made in this regard was, to will her the Engrem lots.

The defendant Ellen is a creditor of Charles' estate. There are other creditors and the estate is insolvent.

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As the oratrix cannot take under the will as against creditors nor Montraville's mortgage, she seeks to revive the Engrem mortgage, and to set it up for her benefit to the extent that the money derived from the Danby place went into it. The defendant Montraville does not object to this, although both he and the other creditors would be unfavorably affected thereby; but the defendant Ellen does object, and claims that a case is not made that warrants its being done as against her. But as she did not become a creditor on the strength of the Engrem mortgage being paid and discharged, she cannot object as a creditor to granting the relief prayed for if the case otherwise warrants it.

It is clear that this money did not belong to Charles. The place from the sale of which it was derived was devoted to the support of the oratrix and her husband, not merely the use, but the *corpus* as well, for it was expected that the full value of it, at least, would be required for such support. The money, therefore, was, in equity, devoted to the same purpose as the land, and it was so intended and declared by Charles, who undertook to effectuate it by his will. Failing in that, there is no reason why equity should not follow the money into the Engrem mortgage, and make it available to the oratrix according to the original intent, by reviving the mortgage and setting it up for her benefit to the extent that the money impressed with the trust went into it, augmented by the interest thereon since.

But how much of it shall now be regarded as thus impressed? The defendant Ellen claims that the amount of the two-hundred-and-fifty-dollar note of January 1, 1875, should be deducted. That note was given to Charles by his father and mother. But as the oratrix was a married woman when she signed it, she is bound thereby neither at law nor in equity. If it was given for any indebtedness, which was denied and does not very clearly appear, it was for her husband's, not hers. *Rood* v. *Willey*, 58 Vt. 474. And if it is now good against his estate, which does not

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appear, the amount of it cannot be deducted from this trust fund, as the fund is not devotable to that purpose.

We think the effect of the deed, the life-lease, and the oral agreement found by the master, is, that Charles was to support his father and mother during life, and therefor, and for what he had already done for them, was to have the place at their death. The life-lease devoted the entire use of the place to their support first of all and at all events. What that lacked of being enough, if anything, Charles was bound to make up, as the rights of the old folks under the lease necessitated the keeping of the *corpus* of the place intact. If Charles was living, this duty could be enforced against him. But he is dead, his estate is insolvent, and the place has been converted into money, and now the oratrix's only remedy is, to follow the money, in which her rights are the same as they were in the place, in which she had an equity aside from the lease, except as those rights may have been altered, if at all, by the changed condition of things. She is entitled, first, to the entire use of the money in any event, as she was to the entire use of the place; and as she cannot now obtain from Charles what more she may need, if anything, she is entitled, second, to resort to the fund itself therefor, as she would have been to the land itself had it not been sold. If there is anything left of the principal of the fund at her death, it will belong to Charles' estate, but first there must be deducted therefrom the amount of whatever Charles ought to have paid for her support but did not, which will go to her estate.

The master reports that most of the money that came from the place went into the Engrem mortgage, but that he cannot tell just how much. This is not definite enough to found a decree upon; there will have to be a further inquiry concerning it. When that amount is ascertained, a proper decree should be entered, reviving and setting up said mortgage to that extent, augmented by the interest thereon since the money went into said mortgage, for the benefit of

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the oratrix as herein indicated. And inasmuch as said mortgage may be redeemed, a trustee should be seasonably appointed to receive, hold, and disburse the money under the order of the court; and for this purpose the case should be retained.

Decree reversed and cause remanded with mandate.

THE NEW ENGLAND GRANITE WORKS *vs.* HARRIET BAILEY.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Parol Evidence to Explain Written Contract.

The plaintiff contracted in writing to furnish "white Westerly granite." That which it did furnish was of a reddish color, but its evidence showed that such stock was classed as white by the trade. Thereupon it became proper for the defendant to show that the expression was likewise applied to stock of a bluish tinge, and that it was the latter which the parties had orally agreed should be furnished.

ASSUMPSIT in the common counts. Pleas, non assumpsit and several special defenses. Trial by court at the March Term, 1896, Washington County, *Ross*, C. J., presiding. Upon the facts found, which are substantially stated in the opinion, judgment was rendered for the defendant. The plaintiff excepted.

F. L. Laird for the plaintiff.

The parol evidence was improperly admitted. *Daggett* v. *Johnson*, 49 Vt. 345; *Smith* v. *Jeffryes*, 15 M. & W. 561; *Herrick* v. *Noble*, 27 Vt. 1; *Taylor* v. *Sayre*, 24 (N. J. L.) 647; *DeWitt* v. *Berry*, 134 U. S. 312.

T. J. Deavitt and *S. C. Shurtleff* for the defendant.

When words are used in a written contract which have a

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technical meaning, parol evidence is admissible to show what they mean to the trade, and when the plaintiff avails himself of this rule it becomes proper for the defendant to prove what was said by the parties when the writing was made as showing the sense in which they understood the terms. *Hart* v. *Hammett*, 18 Vt. 127.

THOMPSON, J. The plaintiff seeks to recover for a balance alleged to be due it for a monument erected on the defendant's lot in Montpelier cemetery. By the terms of the contract which was in writing, the monument was to be of "*white* Westerly granite." The monument erected was of a reddish or chocolate tinge in color. The defendant refused to accept the monument on account of its color, claiming that it must be of a whiter shade to fulfil the contract in respect to color.

The county court found that there are different varieties of Westerly granite known among dealers as "white Westerly granite," none of which are pure white. The coloring material intermixed in some, is of a reddish cast, which will give to the polished surface a chocolate tinge or color, and a slighter tinge or color of the same kind to the hammered surface. These tinges or colors are not all of the same intensity. In another variety of white Westerly granite, the coloring matter is of a bluish color of different intensities. This gives to the polished and hammered surface a grayish white color. A monument from this variety has more of the appearance of clear white than one constructed of the reddish variety. The plaintiff contends that there was no evidence to support the finding that there was more than one kind of Westerly granite known to the trade as white Westerly. We have carefully examined the transcript of the evidence, and find this contention cannot be sustained, there being evidence tending to prove the facts found. For instance, Henry Bertoli, a witness improved by the plaintiff to show that the monument in question was made of white Westerly granite, on cross-examination testified:

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Question. "Are there different kinds of white Westerly? *Answer.* Yes, sir.

Question. There is pinkish white and bluish? *Answer.* There is pink, red, and white and blue."

Other evidence also had the same tendency.

The plaintiff also insists that it was error to permit the defendant to show by parol evidence that at the time the contract was made it was understood and agreed by the parties that the monument should be made from the whitest variety of white Westerly granite, the one which took a grayish rather than a reddish cast. It is urged that this phase of the case falls within the general rule that "parol, contemporaneous evidence is inadmissible to contradict or vary the terms of a valid, written instrument." I Green. Ev. (12th ed.) § 275.

It was incumbent upon the plaintiff to establish that the monument was made of *white* Westerly granite. The granite of which it was made was not white, but of reddish or chocolate color, and did not literally meet the terms of the contract. He was therefore properly permitted to show that it was of a variety known to the trade as white Westerly. It was then permissible for the defendant to show that the phrase "white Westerly granite" was also applied by the trade to the variety of granite from which she claimed the monument was to be built.

The rule of law applicable to these facts was well stated in *Hart* v. *Hammett*, 18 Vt. 127, in which the contract involved called for "*winter strained lamp oil.*" On the trial, the evidence of the plaintiff tended to show that dealers in oil sometimes understood that kind of oil to mean "*winter, strained, sperm, lamp* oil," and that sometimes the term "*winter, strained lamp oil*" meant either *whale* or *sperm* oil. In this state of the case, evidence on the part of the defendant was admitted to show how the parties understood the term, "*winter strained lamp oil*" as used in the contract. To its admission the plaintiff excepted. In disposing of this

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exception, the court said: "It may well be conceded, that parol evidence should not be admitted, to support a construction different from what the words themselves imply. To permit this would be to permit a written contract to be controlled by parol testimony. Parol evidence is, however, admissible, to give an application of a written contract to its subject matter, in cases in which the thing, as expressed, is applicable, indifferently, to more than one subject. * * * * In such case, the question being what was *intended* to have been expressed through the written instrument, any evidence, which would be pertinent to the inquiry, should be received. Wigram on Extr. Ev. 118. In many cases an inference of intention is drawn from circumstances. If the intention of the parties is expressly declared, this should be regarded as far more satisfactory, than to have the intention inferred; and evidence to this point cannot but be material and relevant to the inquiry. The evidence in this case shows that this contract, in its terms, is equally applicable to *sperm* or *whale* oil, and no rule of law is violated in giving it an application to the one, or the other, by evidence *aliunde* the contract." In the case at bar, the phrase "white Westerly granite," being applicable to the granite of which the monument was built, and to that from which the defendant claimed it was to be built, it was competent to show how the parties understood the contract in this respect when it was made. II Phil. Ev. (C. & C. & E's ed.) *718 and n. 510; Stephen's Dig. Ev. Art. 91, div. (8). The finding on this question being in favor of the defendant and against the plaintiff, it cannot recover by reason of the non-performance of the contract on its part, there being no waiver nor acceptance by the defendant.

This view of the case renders it unnecessary to decide whether or not the plaintiff's claim is barred by the statute of limitations.

Judgment affirmed.

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THOMAS H. MURPHY *vs.* JOHN F. LITTLE, apt.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Recognition of Tenancy—Waiver of Notice to Quit by Acceptance of Rent—Accord and Satisfaction.

One who purchases premises held by another under a parol lease, and accepts the stipulated rent, recognizes the tenancy on the terms of the original lease.

A notice to quit is waived by the acceptance of rent for occupation subsequent to the expiration of the notice.

The amount of rent due for May being in dispute, the defendant sent a check with a letter reading, "Enclosed $100 for May rent," which the plaintiff accepted and collected, at the same time writing the defendant demanding further payment. *Held*, an accord and satisfaction.

JUSTICE EJECTMENT. Plea, the general issue. Trial by jury at the September Term, 1895, Chittenden County, *Taft*, J., presiding. Verdict ordered, and judgment thereon rendered, for the plaintiff. The defendant excepted.

R. E. Brown for the defendant.

The acceptance of rent for March and April created the relation of landlord and tenant between the plaintiff and defendant on the terms of the original lease.

The acceptance of the checks offered for the rent for April, May and June constituted a satisfaction of the plaintiff's claim for those months. Therefore no rent was due at the commencement of the suit. *Bromley* v. *School Dist.*, 47 Vt. 381; *Preston* v. *Grant*, 34 Vt. 202; *Conn. River Lumber Co.* v. *Brown*, 68 Vt. 239.

The acceptance of the checks operated as a waiver of the notice to quit. Consequently the defendant was lawfully in possession when the suit was commenced. II Taylor, Landlord and Tenant, §§ 485–497; *Wilder* v. *Ewbank*, 21 Wend. 587; *Ireland* v. *Nichols*, 46 N. Y. 413; *Conger* v.

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Duryee, 90 N. Y. 594; *Webster* v. *Nichols*, 104 Ill. 160; *Newman* v. *Rutter*, 8 Watts 51.

Failing to recover possession, the plaintiff must fail to recover rent, since the latter is only incidental to the former. V. S. 1563.

E. R. Hard and *Seneca Haselton* for the plaintiff.

The defendant was a tenant at will only. V. S. 2218; *Amsden* v. *Blaisdell*, 60 Vt. 386.

The notice of March tenth terminated the tenancy, and the plaintiff was entitled to maintain this action. *Chamberlin* v. *Donahue*, 45 Vt. 50; *Barton* v. *Learned*, 26 Vt. 192.

The defendant by occupying after the notice of increase in rent impliedly promised to pay the amount named. *Amsden* v. *Blaisdell*, 60 Vt. 386.

The rent being two hundred dollars for May, the defendant was still in default one hundred dollars after the payment. The acceptance of the check, accompanied by a demand for the balance, was not a satisfaction of the plaintiff's claim.

THOMPSON, J. At the time the defendant purchased the property in question of John J. Thompson, the defendant was in possession thereof under a parol lease from Thompson for one year, beginning July 20, 1892, and ending July 20, 1893, at an annual rent of $1200, payable in instalments of $100 on the first day of each month in advance. Under this lease the defendant was a tenant at will only. V. S. § 2218; *Amsden* v. *Blaisdell*, 60 Vt. 386. The premises were conveyed, to the plaintiff by Thompson, February 23, 1893. Subsequent to the conveyance the plaintiff accepted rent of the defendant for the months of March and April, and thereby the relation of landlord and tenant was created between them, subject to the terms of the original lease. March 10, 1893, the plaintiff gave the defendant written notice to quit the premises on May 1, 1893, and April 1, 1893, he further notified him in writing, that if the notice to quit was not complied with, the rent would be $200 per

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month after May 1, 1893. The defendant did not quit the premises pursuant to the notice to quit. The evidence tended to show that after May 1, 1893, there was a controversy between the plaintiff and the defendant in respect to the rent the latter was bound to pay for his occupation of the premises subsequent to that date. May 1, 1893, the defendant sent the plaintiff a check for $100 in a letter addressed to him, the body of which was as follows: "Enclosed $100 for May rent." Again on May 31, 1893, the defendant sent the plaintiff a check for $100 in a letter addressed to him, the body of which was as follows: "Find check for $100 for June rent." The plaintiff received both these checks, retained them and collected the money thereon. It is now contended by the defendant, that the acceptance of these two checks by the plaintiff, under the explicit declaration in the letters accompanying them that they were for the May and June rent, operates as an accord and satisfaction of the rent for these months. We think the construction to be given these letters is that the checks were offered and if accepted, were to be taken, for the entire rent for these months. Hence the acceptance and retention of the checks by the plaintiff operated as a satisfaction in advance of the rent for May and June. The plaintiff could not escape the legal effect of his acceptance of the amount offered, by writing the defendant for further payment of rent for these months. The satisfaction of the rent operated at once when the checks were accepted and retained by the plaintiff. *Conn. River Lumber Co.* v. *Brown*, 68 Vt. 239.

Under the circumstances of this case, the acceptance of the rent for May and June, operated as a waiver of the notice to quit and the notice in respect to the proposed increase of rent. This suit was brought June 5, 1893. At that time there was no notice to quit operative on the defendant, nor was there any rent due, it having been paid in advance for the entire month of June. It was, therefore, error for the county court to direct a verdict for the plaintiff.

Judgment reversed and cause remanded.

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C. D. BIGELOW, exr., *vs.* GEORGE H. CROSS, apt.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Contract not to Extend Building.

A contract between adjoining-lot owners that the front of a building upon one of such lots shall not be extended, is broken by an addition which, though incomplete, obstructs the view and makes the premises unsightly.

The defendant having thus broken his contract could not avoid liability by declaring that he might yet remove instead of completing the structure, nor even by doing so after the action had been brought.

GENERAL ASSUMPSIT. Plea, the general issue. Heard on an agreed statement at the June Term, 1896, Caledonia County, *Ross*, C. J., presiding. Judgment for the defendant. The plaintiff excepted.

The facts appear in the opinion.

W. P. Stafford for the plaintiff.

Dunnett & Slack for the defendant.

START, J. It appears from the agreed statement of facts, that, on the 20th day of January, 1892, the defendant owned a building and lot on the west side of Main street in the village of St. Johnsbury, immediately north of a dwelling-house and lot owned by the testator; that the fronts of these buildings were about equally distant from the street and about nine or ten feet from the sidewalk; that, on the day and year above named, the testator paid the defendant $100, in consideration of the defendant's agreement not to extend the front of his building beyond its then bounds; and that the defendant executed a writing acknowledging the receipt of the money and agreeing to refund the same, with interest, in case he violated his agreement. On the 11th day of November, 1895, the

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defendant made a contract with a builder to erect a one-story addition to the front of his building, to extend eight and one-half feet toward the sidewalk. Pursuant to this contract, the foundation was laid, a frame erected thereon, and the sides, front and roof of the same partly boarded. The structure remained in this condition until two weeks after the date of the writ, when the defendant had it taken down. On the day of the date of the writ, the plaintiff demanded the $100 and interest. Payment was refused, and this action was thereupon brought. When the defendant refused to refund the money, he stated, that he had stopped work on the addition, and it was uncertain whether he would complete it or remove it; and that he would pay the $100 if he went on with the addition, but, if he did not, he did not want to pay it.

The defendant's counsel insists, that there was no breach of the defendant's agreement at the time the suit was brought, because the extension of the building toward the street was not a completed structure; and that nothing short of a substantially completed structure would entitle the plaintiff to a return of the money. If this is the true construction of the contract, there would seem to be no good reason why the defendant might not, at all times, maintain an incomplete structure that would obstruct the plaintiff's view as effectually as a completed structure, and thereby defeat the object and purpose of the contract for which the testator paid the $100; but this is not the true construction of the contract. It is clear that the purpose of the agreement was to prevent the defendant from injuring the testator's premises by making them unsightly and obstructing the view. The incomplete structure obstructed the view as effectually as a completed structure would, and was of such a character as to constitute a breach of the agreement; and the fact that the defendant removed the structure after the right to the return of the money had become absolute, and a suit had been brought for its

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recovery, will not defeat the action. The defendant had no right to extend the front of his building and keep the money. He did extend it and suffered it to so remain for two weeks after the money was demanded, its return refused, and suit brought for its recovery. Under these circumstances, full effect will be given to the contract by awarding a return of the money and interest thereon, and leaving the defendant in the enjoyment of his original rights.

Judgment reversed; judgment for the plaintiff to recover $129.00 and his costs.

J. H. KELLEY *vs.* FRED DOWNING.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Immaterial Evidence—Motion to Discharge Panel.

The issue being whether an exchange of horses was absolute, or conditional upon the horse received by the plaintiff proving tractable, the court properly excluded evidence of what the plaintiff believed at the time of the bargain about his ability to manage the horse, as well as expert evidence as to the effect upon a horse's disposition of such a fright as the horse in question had experienced.

The defendant having suggested that the horse be used with another, it was not error to permit the plaintiff to testify that he did so use her and that she then kicked and balked.

It is not error for the trial court to deny a motion to discharge the panel on the ground that a juror has had a private conversation with one of the parties, the juror testifying that it had no reference to the case.

REPLEVIN for a mare. Plea, the general issue. Trial by jury at the March Term, 1896, Washington County, *Ross*, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

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The plaintiff's evidence tended to show that he exchanged horses with the defendant on the condition that the plaintiff might try the horse he received until nine o'clock the next morning and if she worked well on a milk cart the trade should be binding. The defendant's evidence tended to show that the exchange was absolute. The trade was made on an occasion when the defendant was making an unsuccessful attempt to use the horse, and the negotiations were opened by the plaintiff's proposal to the defendant, "Come up here and trade for a horse that you can use." The defendant offered to ask the plaintiff as a witness upon the trial whether he did not come to the opinion on the spot that he could manage the horse although the defendant could not. The question was excluded and the defendant excepted.

The horse delivered to the plaintiff had run away and been severely frightened and according to the defendant's evidence had never before the runaway kicked or balked. The defendant introduced a witness, acquainted with the horse and qualified to speak as an expert, by whom he offered to show what the effect of such a runaway would be upon the disposition of such a horse. The evidence was excluded and the defendant excepted.

Upon the adjournment of court at the end of the first day's session, the plaintiff had a private conversation with one of the jurors, which the juror testified had no reference to the case. The defendant at the opening of the court the next morning moved that the panel be discharged. The motion was denied and the defendant excepted.

John W. Gordon for the defendant.

W. E. Barney and *Richard A. Hoar* for the plaintiff.

START, J. The plaintiff claimed that he exchanged horses with the defendant on condition that the horse received of defendant would work on a milk cart. The defendant claimed that the exchange was absolute. On this issue,

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what the plaintiff thought before the exchange about his being able to handle the horse was immaterial; and the testimony was properly excluded. For like reason, the expert evidence offered by the defendant to show the effect of a runaway upon a horse's disposition was properly excluded. So far as appears from the exceptions, the only question about which the parties were at issue was whether the exchange was conditional in the respect claimed by the plaintiff; and the testimony offered and excluded could have no bearing upon this issue. It not appearing that there was any issue to which this testimony was pertinent, error does not appear. The plaintiff having testified that the defendant suggested that the horse be used with another, it was not error to allow him to testify that he did so, and the horse kicked and balked when so used. The juror, Ellis, was not legally disqualified by reason of the talk he had with the plaintiff; and, while the court, in its discretion, could have discharged the panel and called another, its declining to do so was not error.

Judgment affirmed.

DOWNER AND KENNEY, executors, *vs.* AUSTIN HOWARD.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Jurisdiction—Estoppel.

When an executor begins his action before the defendant's claim against the estate has been acted upon by commissioners, the jurisdiction of the common law court is exclusive, and he may insist upon it although, since the bringing of his action, he has contested the defendant's claim before the commissioners.

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Assumpsit. Heard on an agreed statement at the May Term, 1896, Windsor County, *Tyler*, J., presiding. Judgment for the plaintiff. The defendant excepted.

The commissioners made their report to the probate court August 15, 1892, finding a balance due to the defendant, for which judgment was there rendered in his favor. The other facts appear in the opinion.

D. C. Denison & Son for the defendant.

J. J. Wilson for the plaintiff.

Start, J. It appears from the agreed statement of facts, that Chester Downer and the defendant, Austin Howard, were formerly partners; that Chester Downer deceased February 19, 1890; that commissioners on his estate were appointed and held their first meeting June 25, 1890; that the defendant presented a claim to the commissioners, but no hearing was had before them until July, 1891; that the only matter investigated by the commissioners was the standing of the book accounts between the parties; and that the notes in question were not presented to the commissioners. Chester Downer, at the time of his decease, held three notes against the defendant; and, on the 8th day of October, 1890, the plaintiffs brought this suit declaring on these notes, and secured the same by attachment.

The defendant insists that the plaintiffs are estopped from prosecuting this suit, by reason of their appearing before the commissioners and adjusting the accounts of the parties. When this case was before us on demurrer to the defendant's pleas, it was held, that, when an executor or administrator commences an action to recover a debt or claim in favor of the estate against a person having a claim or demand against it, either before or after such person has presented his claim to the commissioners for allowance, and before they have acted thereon, the jurisdiction of the probate court in respect to the claims or demands of either party is ousted by the commencement and pendency of such action;

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and that all proceedings thereafter in the probate court, during the pendency of such action, in respect to the claims or demands of either party, are absolutely void. *Kenney and Downer, exrs.*, v. *Howard*, 67 Vt. 375. It appears from the agreed statement of facts, that this suit was commenced before the commissioners acted upon the defendant's claim, and was pending in the county court when a hearing was had before them. Therefore, the county court had exclusive jurisdiction of the respective claims of the parties; and the claim sought to be recovered is not barred by reason of anything that transpired before the commissioners, or the probate court. Nor are the plaintiffs estopped from prosecuting this action by reason of their appearing before the commissioners, who acted without jurisdiction, and contesting the defendant's claim. The judgment of the court below was correct. As the parties have, by their stipulation, reserved the right to litigate other questions raised by the pleadings, the judgment will be reversed *pro forma*, to enable them to do so.

Judgment reversed pro forma, and cause remanded, with costs to the plaintiffs.

JULIA ATKINS'S ESTATE *vs.* HIRAM ATKINS'S ESTATE.

October Term, 1896.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Claim Recoverable before Commissioners—Competency of Witnesses under V. S. 1237, 1238.

The estate of the husband is liable to the estate of the wife for the price which he was to pay her for property conveyed to him by her procurement, and the claim is recoverable before commissioners.

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One whose only part in the transaction has been to convey the property by the wife's direction is not incompetent as a witness under a statute which excludes the testimony of the survivor of contracting parties.

Where both parties to the contract in issue are dead and the plaintiff and defendant are their admistrators, neither representative is incompetent as a witness under a statute which excludes the opposite party from testifying against an administrator.

There having been evidence tending to support the finding of the county court, its finding is conclusive.

APPEAL FROM PROBATE. Declaration, the common counts in assumpsit. Plea, the general issue. Trial by court at the March Term, 1896, Washington County, *Ross*, C. J., presiding. Judgment for the plaintiff. The defendant excepted.

The plaintiff estate was represented by Henry M. Kimball, administrator, and the defendant estate by George Atkins, executor. Said Kimball as administrator upon the estate of Julia Atkins's father had, during her life, by her direction, conveyed to Hiram Atkins her share in that estate, the price of which property was here sought to be recovered.

Dillingham, *Huse & Howland* for the defendant.

Henry M. Kimball was incompetent as a witness. V. S. 1237, 1238.

The court was not justified by the evidence in finding that the expressed purpose of Julia Atkins to give the property to her husband had never been carried out.

The plaintiff has sought the wrong forum. If he has any remedy it is in equity. *French* v. *Holt*, 57 Vt. 187; *Niles* v. *Howe*, 57 Vt. 388; *Lamson* v. *Worcester*, 58 Vt. 381; *Mann* v. *Mann*, 53 Vt. 48.

L. M. Read and *George W. Wing* for the plaintiff.

MUNSON, J. This is an appeal from the decision of the commissioners on the estate of Hiram Atkins, disallowing a claim presented by the estate of Julia Atkins. The decedents were husband and wife. The claim is for the amount the husband was to pay the wife for certain

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property conveyed him by her procurement. Such a claim is recoverable in this proceeding. *Spaulding* v. *Warner's Est.*, 52 Vt. 29; *Purdy* v. *Purdy's Est.*, 67 Vt. 50.

Henry M. Kimball was a competent witness in support of the claim. He was not within the provision which excludes the testimony of the survivor of contracting parties. He was in no sense a party to the contract in issue and on trial. His only part in the transaction from which the claim arose was to convey the property as directed. Nor was he within the purpose and meaning of the provision which excludes the opposite party from testifying against an administrator. There was no inequality between the parties contesting this suit. Both the original parties to the contract were dead, and both were represented by administrators. See V. S. 1237, 1238.

The court below has found that the expressed purpose of Mrs. Atkins to give the property to her husband was not carried out, and that she died leaving it as her own in his hands. There was evidence tending to support this finding, and it is conclusive.

Judgment affirmed.

IN RE ESTATE OF JOHN KELSO, MARIETTE PACKARD AND FRED PACKARD, apts.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Estate Tail—V. S. 2201.

A devise of the use of land to A for life, then the land itself to B and the heirs of B's body forever, creates a life estate in A and, by virtue of V. S.

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2201, a life estate in B upon the death of A, with the remainder in fee simple to the heirs of B's body.

A decree made during B's life should run in favor, not of the now living children of B, by name, but of the heirs of B's body.

APPEAL FROM PROBATE. Heard at the June Term, 1896, Bennington County, *Start*, J., presiding. The decree of the probate court was affirmed *pro forma*. The appellants excepted.

The will and decree, so far as material, are stated in the opinion.

Barber & Darling for the appellants.

Batchelder & Bates for the estate.

START, J. John Kelso, by his last will, gave his wife, Susan E. Kelso, the use of his real estate during her natural life, and devised one-half of what should remain of his real estate at the decease of his wife to his daughter, Mariette Packard, to be held by her in her own right, and the heirs of her body forever.

After the decease of Mrs. Kelso, the probate court, and the county court on appeal, decreed distribution of the estate of John Kelso under his will, and thereby decreed to Mariette Packard the use of one-half of the real estate during her natural life, and the remainder to Fred Packard, Carrie Packard and Lizzie Packard, and their respective heirs and assigns forever.

Mariette Packard insists, that, on the decease of her mother, Mrs. Kelso, one-half of the real estate passed to her in fee simple, under V. S. 2201, and that the same should have been so decreed to her. This statute provides, that, where, by the common law, a person might become seized in fee tail of lands, by virtue of a devise, gift, grant, or other conveyance, or by other means, such person, instead of being seized thereof in fee tail, shall be seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail

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would, on the death of the first grantee, devisee, or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant, or conveyance.

Under this statute, Mariette Packard took, by the will of her father, an estate for her life, and, by virtue of the devise, the remainder passed in fee simple to the heirs of her body. Mrs. Kelso was not seized of the estate in fee tail. By the express terms of the will, she took only the use of the estate during her natural life. This created a life estate only and not an estate in fee tail. *Blake and Wife* v. *Stone*, 27 Vt. 475; *Ford* v. *Flint*, 40 Vt. 382. The first estate devised in fee tail was to Mariette Packard; and, by force of the statute, she became seized of the estate for life only; and the remainder passed in fee simple absolute to the heirs of her body forever. *Giddings* v. *Smith*, 15 Vt. 344; *Thompson* v. *Carl*, 51 Vt. 408. The remainder of the one-half of the real estate decreed to Mrs. Packard during her life, should have been decreed to the heirs of her body, instead of the children named in the decree. In other respects, the decree is correct.

The pro forma decree of the court below is reversed; and the remainder of the one-half of the real estate decreed to Mariette Packard during her life, is decreed to the heirs of Mariette Packard's body, and their heirs and assigns forever. In other respects the decree is affirmed, without costs.

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JAMES RUSSELL *vs.* HENRY S. DAVIS, J. J. NORTON, trustee, and CLARA M. DAVIS, claimant.

October Term, 1896.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Judgment of County Court on Commissioner's Report.

If the judgment of the county court upon the report of a commissioner can be fairly sustained by any inference of fact to be drawn from the report, it will be presumed to have been based upon such inference.

TRUSTEE PROCESS. Heard upon the report of a commissioner at the March Term, 1896, Rutland County, *Taft*, J., presiding. Judgment that the claimant is entitled to the funds, with costs, and that the trustee be discharged with costs. The plaintiff excepted.

The report disclosed the following facts. August 14, 1894, the defendant, in common with his mother, Elizabeth Davis, owned real estate which, on that date, they conveyed for the price of one thousand dollars; in which price the mother's share was three hundred dollars. About September 27, 1894, the defendant received, as part payment from the purchaser, three hundred dollars which he used on that day in purchasing and taking to his wife, Clara M. Davis, an assignment of a real estate mortgage against the trustee. Two or three months later, Elizabeth Davis and Clara M. Davis made an oral agreement that the former's interest in the real estate so conveyed by the defendant and herself should thereafter belong to Clara M. Davis in consideration of their mutual expectation that the mother would live more or less in the son's family. The rest of the one thousand dollars was used by the defendant. The trustee was not notified of the assignment, nor was it ever recorded.

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Horace W. Love and *A. G. Cooledge* for the plaintiff.

Butler & Moloney for the claimant.

THOMPSON, J. If the judgment of the county court can fairly be sustained by any inference of fact it might have drawn from the commissioner's report, it is to be presumed in this court, that the county court based its judgment on such inference. *Emery* v. *Tichout*, 13 Vt. 15; *Stone* v. *Foster*, 16 Vt. 546; *Birchard* v. *Palmer*, 18 Vt. 203; *Wills* v. *Judd*, 26 Vt. 617; *Pratt* v. *Page*, 32 Vt. 13.

From the facts reported, the county court might well draw the inference that the three hundred dollars invested in the John J. Norton mortgage was set apart by the defendant and his mother, Elizabeth Davis, as her share of the money received for their house in Granville, N. Y.; that the assignment of the mortgage and debt thereby secured was made to the claimant for the benefit of Elizabeth, and that subsequently the latter sold her interest therein to the claimant; and that all this occurred prior to the service of the trustee process. On these facts the claimant was clearly entitled to this fund.

The plaintiff does not now claim to hold the amount of the hundred dollar note secured by chattel mortgage.

Judgment affirmed with costs to the claimant.

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ALBERT SOWLES *vs.* MYRON W. BAILEY.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Certiorari—V. S. 1640—Estoppel.

The writ of *certiorari* does not lie for the correction of errors which might have been set right by appeal.

V. S. 1640 confines the writ to the reversal of final judgments or decrees.

One may estop himself from the right to invoke the aid of the writ by neglecting to do so until after the rights of third parties have intervened, and especially by engaging in and consenting to the proceedings which he afterwards seeks to have declared void.

PETITION FOR WRIT OF CERTIORARI, to the supreme court for the County of Franklin. Heard at the January Term, 1897. The case is fully stated in the opinion.

E. A. Sowles for the petitioner.

The petitionee, by reason of his interest as creditor, was wholly without jurisdiction in the premises. V. S. 2337, 901, 2048; *Moses* v. *Julian*, 45 N. H. 52; *Coffin* v. *Cottle*, 9 Pick. 290; *Sigourney* v. *Sibley*, 21 Pick. 101: 22 Pick. 507; *Freelove* v. *Smith*, 9 Vt. 180; *Sanders* v. *Pierce*, 68 Vt. 468; *Foot* v. *Morgan*, 1 Hill, 654; *Oakley* v. *Aspinwall*, 3 N. Y. 547; *Hawley* v. *Baldwin*, 19 Conn. 589; *Hesketh* v. *Braddock*, 3 Burr. 1847; *Pearce* v. *Atwood*, 13 Mass. 339; *Wilson* v. *Wilson*, 36 Ala. 655; *Bacon's Appeal*, 7 Gray 391; *Knight* v. *Hardeman*, 17 Ga. 253; *Matter of Dodge*, 77 N. Y. 107; *Reg.* v. *Hertfordshire*, 6 Q. B. 753: 51 E. C. L. 753; *Gay* v. *Minot*, 3 Cush. 352; *Hall* v. *Thayer*, 105 Mass. 219; Wells, Juris. § 172; I Story, Eq. Juris. §§ 310-312.

The lack of jurisdiction could not be supplied, waived or cured by the consent or participation of the petitioner. The proceedings are absolutely void. *Lamson* v. *Worcester*, 58

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Vt. 381; *Stockwell* v. *White Lake*, 22 Mich. 341; *Oakley* v. *Aspinwall*, 3 N. Y. 547; *Strong* v. *Strong*, 9 Cush. 570; *Post* v. *Black*, 5 Denio 66; *Wise* v. *Withers*, 3 Cranch 331; *People* v. *Smith*, 55 N. Y. 135; Wells, Juris. § 57; *Carleton* v. *Taylor*, 50 Vt. 220, 227; *Vaughn* v. *Congdon*, 56 Vt. 111; *Barrett* v. *Crane*, 16 Vt. 246; *Darling* v. *Bowen*, 10 Vt. 148; *Walbridge* v. *Hall*, 3 Vt. 114; *Bates* v. *Hazeltine*, 1 Vt. 81.

Hence the granting of the writ is matter of legal right and does not, as in other cases, rest in the sound discretion of the court.

H. A. Burt, *Wilson & Hall* and *Farrington & Post* for the petitionee.

The supreme court has no power to issue the writ to the court of insolvency. The statute has provided the only means for correcting errors in the latter court by appeal to the county court and exceptions to the supreme court. *Peters* v. *Peters*, 8 Cush. 529; II Spelling on Extr. Relief, §§ 1890–1918; *Petition of Tucker*, 27 N. H. 405; *B. & M. R. R.* v. *Folsom*, 46 N. H. 64; *Brown* v. *Webber*, 6 Cush. 563; Harris, *Certiorari*, §§ 20–44.

If the petitionee is right in his position that the proceedings are absolutely void, there is no occasion for the writ. *Peters* v. *Peters*, 8 Cush. 529; II Spelling, Extr. Relief, §§ 1890–1918.

The writ is barred by the statute of limitations as to all orders not made within one year next preceding the service of the petition. The only order within the year was made at the request of the petitioner.

The petitioner is estopped by his own conduct. *State* v. *Haynes*, 35 Vt. 565; V. S. 1233; *Bellows* v. *Weeks*, 41 Vt. 590; *Quinn* v. *Halbert*, 52 Vt. 353; *Richards* v. *Moore*, 60 Vt. 449; Spelling, *supra*, § 1901; *Ellis* v. *Smith*, 42 Ala. 349; *Collins* v. *Hammond*, 59 Ala. 448.

Ross, C. J. This is a petition, dated October 14, 1896, for a writ of *certiorari*, preferred to this court at its October

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General Term, 1896, against Myron W. Bailey, as judge of the court of insolvency within and for the district of Franklin. The petitioner avers that proceedings in insolvency were commenced against him before the petitionee as such judge in 1885, and that the petitionee as such judge, had made various decrees and orders against the petitioner down to the time of filing this petition; that the petitionee, as such judge, had no jurisdiction in the premises; and that the files and records therein of the court of insolvency are erroneous and illegal for the causes recited in and annexed to the petition. For causes of error the petitioner avers that, before and at the time of the adjudication, and ever since, the petitionee was the owner and possessor of a certain claim, debt, or account, against the petitioner, which, in 1889, in his own behalf—he then being an attorney at law—the petitionee proved, allowed, and adjudicated in the court of insolvency, whereby the petitionee was and is interested, as a creditor or otherwise, in the questions and proceedings decided, and to be decided in and by the court of insolvency, and was and is interested in the event of the cause, either, by his interest in the claim, or by reason of having acted as an attorney in the proof thereof; and so became disqualified from acting in a judicial capacity, either as trier, or otherwise, in the matter of the insolvency proceedings; that the petitioner on October 1 and 7, 1896, filed in the court of insolvency motions and objections to the jurisdiction of the petitionee, as judge of the court of insolvency, in the matters and proceedings therein against the petitioner. For these errors he prays that the writ may issue, and, on the record being certified to the court. that all judgments, orders, and decrees in the insolvency proceedings in the court of insolvency may be set aside and declared void.

Upon presentation of the petition, the court issued an order to the petitionee to answer the petition, and made orders in regard to taking testimony. The answer was duly

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filed, and the testimony taken and filed. The testimony is voluminous. About many things the parties and witnesses agree. In regard to others they disagree. These facts, in substance, appear. The petitionee has been judge of probate for the district of Franklin for a good many years, and *ex officio* judge of the court of insolvency. In 1877 and 1878 the petitioner was administrator on the estate of C. S. Hogle, then being administered in the probate district, before the petitionee. During the years of 1877, 1878 and 1882 fees accrued in the settlement of that estate against the petitioner to the amount of $39. By the statute, it was the duty of the petitioner to pay these fees to the petitionee, as judge of probate, for the benefit of the state. There are fees payable not for the benefit of the state, but it is not shown that any such are in this bill. It was the duty of the petitionee, as such judge, to account for them in his settlements with the auditor of accounts semi-annually. It does not appear whether he did, or did not, so account for them. During all the time covered by the proceedings in insolvency, the petitioner knew that these fees were due from him as such administrator to the petitionee, as such judge of probate, and knew that the petitionee made proof of them against his estate in insolvency, at the time they were proved in 1889, or soon thereafter, and made no objection thereto. On the testimony of the petitionee, the petitioner expressly assented to their allowance against his estate.

In March, 1884, George W. Foster, claiming to be a creditor of the petitioner, filed, in the court of insolvency, a petition to have the petitioner adjudged an insolvent. No action was taken on this petition until May when the National Bank of Middlebury intervened as a petitioning creditor. The two petitions were heard together by the petitionee, acting as judge of the court of insolvency, in July, 1884. He ordered the petitions dismissed. From this order the National Bank of Middlebury appealed to the

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county court. In the latter court, such proceedings were had, that, at its April Term, 1886, the petitioner was adjudged to be insolvent, and the cause was remanded to the court of insolvency to be proceeded with. Thereupon, in compliance with the order of the court, held by the petitionee, the petitioner filed a schedule of his debts and of his assets. These showed that the petitioner was deeply insolvent. The first meeting of the creditors was called and holden. The petitioner assented to the debts then proved against his estate, and agreed, with those voting, upon the assignees chosen. One was his brother-in-law, and president of the National Union Bank of Swanton. The other had given certain notes for the petitioner's accommodation to the First National Bank of St. Albans, of which the petitioner had been cashier. The petitioner also had large interests in the National Union Bank of Swanton. His brother, Merritt Sowles, was president of the First National Bank of Plattsburgh in which the petitioner had an open, unsettled account. His estate was involved with the affairs of these three banks. The two first were insolvent, and then, or soon after, placed in the hands of receivers. Complications and suits arose between his estate and these banks which delayed the settlement of his estate. The assignees also brought a suit against the Burlington Savings Bank, to have a mortgage annulled which the petitioner had given to the Savings Bank, to secure a debt due it, shortly before the Foster petition was filed. These suits except that last named were finally compromised with the consent of the petitioner, and approval of the petitionee, acting as judge of the court of insolvency. Every debt, or nearly every debt, proved against his estate was originally proved with the petitioner's consent and approval. Since then, he, and his brother Merritt have moved to have the allowance of some of the debts vacated, or some portions of them, on the claim that the consent was given in ignorance of certain facts touching their validity against his

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estate. These claims were made after the petitioner and his brother, Merritt, became interested, by having purchased quite an amount of the claims proved. The petitioner was in full accord with, and consented to, all the actions of the assignees, and of the court, to January, 1891. The suits, and the relation of his estate to the affairs of the First National Bank of St. Albans and of the National Union Bank of Swanton were adjusted in 1889. Soon thereafter the petitioner, mostly through his brother, Merritt, and the First National Bank of Plattsburgh, began to purchase claims proved against his estate, and schemes for a settlement of his estate by way of compromise, have been on foot ever since. None of them ripened into an adjustment. The parties do not agree in regard to whose fault defeated their accomplishment. At times the petitioner and his brother, Merritt, did not agree. The assignees were interested in some of the allowed claims, which the petitioner and Merritt desired to have disallowed, and disagreement arose in regard to this. One of these claims was in favor of the First National Bank of Plattsburgh. Early in 1896, Merritt Sowles, the First National of Plattsburgh, and the assignees, owned nearly all, if not all the claims proved against the petitioner's estate in insolvency. The petitioner claims to be interested in those standing in the name of his brother, Merritt. The petitioner and Merritt did not agree in regard to the proposed compromise. Hence, with the petitioner's approval and consent, and under an order of the court, after a good deal of negotiation, the assignees effected a settlement of all the claims owned by Merritt Sowles, and by the First National Bank of Plattsburgh, August 8, 1896. By this settlement all such claims were cancelled, and a certain mortgage which the Bank held was transferred to the assignees. During these years, settlements had been made with other claimants, with the consent and approval of the petitioner, and of the court. Also property belonging to his estate had been sold

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and conveyed. Some of it had been conveyed to a trustee, and some to the petitioner with a view of carrying into effect some of the proposed compromises. The assignees found that the petitioner had conveyed some real estate, which they claimed to be a part of his estate, to his daughter. They also claim, that he had property in his hands which belonged to his estate. He made a claim for services, rendered for the assignees, in the settlement of his estate. Early in 1896, the assignees petitioned the court of insolvency to have the petitioner called before the court and examined in regard to his property, which they claimed he had not turned over to them, and in regard to his conveyance of some of it to his daughter. There were two petitions brought for this purpose. The hearing of them had been continued, from time to time, but, at length were brought on, October 1, 1896. The petitioner refused to answer, when put under oath for the purpose of being examined, and objected that the petitionee was without jurisdiction in the matter, because of the proof of the claim for probate fees, made in 1889. The petitions were then discontinued and the petitionee filed a release under seal of the claim for probate fees, proved. The assignees then renewed their petitions, and called the petitioner and his daughter before the petitionee, as judge of the court of insolvency for examination. On being sworn both declined to answer, and this petition was brought to have the writ of *certiorari* issue to bring up and quash the entire record in the insolvency proceedings against the petitioner.

This is an outline of the main features and facts of the case. It is to be observed that the only order or decree of the court of insolvency shown to be made, in the insolvency proceedings against the petitioner, within the year next before this petition was brought, is that approving the purchase and cancellation of the debts proved against his estate, from Merritt Sowles, and the First National Bank of Plattsburgh, of which the petitioner at the time approved,

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and of which he does not especially complain, either in his petition or in his testimony. Edward A. Sowles, the brother and attorney, in his brief of facts, makes many and grevious charges against the assignees and against the petitionee, in his action as judge of the court of insolvency, but he does not say that the purchase and cancellation of the claims proved against the estate, held by Merritt Sowles and by the First National Bank of Plattsburgh were improvident, nor does he ask especially to have the decree of approval of the purchase and cancellation vacated and set aside. He contends vigorously that the debt proved in favor of the First National Bank of Plattsburgh was unjustly proved, and ought to be expunged from the list of debts proved. He admits that the petitioner consented to most of the orders and decrees of the petitionee, acting as judge, now complained of, and of most of the acts of the assignees, but contends that he was induced to take this course, in the vain endeavor to get his estate settled.

The question is whether on this outline, it is the duty of this court to issue the writ of *certiorari*. It is an extraordinary remedy, not applicable to courts whose proceedings are according to the course of common law. Errors, in those courts, are rectified by appeal, exceptions, and writs of error. It is quite generally held that this writ will not be allowed where the errors of an inferior court, whose proceedings are not according to the course of the common law, can be corrected by appeal to a higher court. *Logue* v. *Clark*, 62 N. H. 184. In the insolvency proceedings the petitioner could have appealed from an adjudication of insolvency to the county court. V. S. 2156. Appeals are also allowed to creditors and assignees in regard to allowance or disallowance of claims to an amount exceeding twenty dollars. V. S. 2058, 2090. They are allowed to the debtor, creditor, or assignee to the court of chancery from the decision of the judge upon the question of granting the certificate of discharge. V. S. 2136. If, as now contended,

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the fact that the petitionee was connected with the probate fees, as heretofore stated, disqualified him from acting as judge of insolvency in the matter of the petitioner, the latter could have availed himself of that fact both when the petitions of Foster and the National Bank of Middlebury were before the petitionee for hearing, and on the appeal in the county court. The attorney for the petitioner concedes that the granting of this writ rests in the sound, legal discretion of this court. It cannot properly be contended that sound, legal discretion requires the granting the writ to the extent of blotting out the record of the whole insolvency proceedings, covering a period of twelve years, in and by means of which rights to property have been compromised and settled, the title to property transferred, and the interests of third parties become fixed and cannot be restored to their former condition, especially when the petitioner, if not a party, has been active in, and consented to, nearly all that has been done therein. A party, as shown by all the authorities, may estop himself from the right to invoke the aid of this summary remedy by laches, or failure to invoke it until the rights of third parties have intervened and become fixed, so that they cannot be restored to their former condition. It is to take, in a measure, the place of a writ of error when that writ is not available. It is a common law writ, and available to a party only under the circumstances provided by statute. By statute, it is coupled with a writ of error. V. S. 1640 reads, "A writ of error or petition for *certiorari* shall be commenced and served on the adverse party within one year after the rendition of the judgment to reverse which such writ or petition is commenced." From the language of this section its use is evidently confined to the reversal of final judgments or decrees. This clearly requires this court to deny the writ under the circumstances of this case. At most it could only reach and vacate the decree of approval of the purchase and cancellation of the claims proved against his estate,

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owned by Merritt Sowles and the First National Bank of Plattsburgh which is an interlocutory order. Besides, what is shown in regard to his approval and helping on that purchase forbids this court from granting it.

We thus dispose of this application without considering many of the questions discussed before us. In this disposal, the court is not to be understood as approving of the course of the petitioner in endeavoring to manage and control the settlement of his estate by compromise, so as to save a good share of it to himself; nor of the appointment nor acceptance by assignees of the settlement of an estate in which they are largely interested, and in which conflicting interests may arise; nor of a judge in taking jurisdiction of the settlement of an insolvent estate, in which he may be directly or indirectly interested, or in taking steps, with consent of the adversary party, or otherwise, which may apparently give him pecuniary interest, however small, in its settlement.

The petition is dismissed with costs.

H. O. Camp *vs.* J. H. Ward, et al.

January Term, 1897.

Present: Ross, C. J., Taft, Rowell, Tyler, Munson, Start and Thompson, JJ.

Bill for Relief from Judgment Obtained by Perjury—Bill of Discovery.

The acts for which a court of equity will, on account of fraud, set aside a judgment between the same parties, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered.

Hence a bill is demurrable which seeks to set aside a judgment between the same parties upon the allegation that it was based upon perjured

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testimony of the true nature of which the defendants were or ought to have been aware.

The bill cannot be sustained as a bill of discovery, since the judgment is conclusive against the orator that he has no interest in the matter respecting which discovery is sought.

BILL IN CHANCERY. Heard on demurrer at the September Term, 1895, Washinton County, before *Ross*, Chancellor. *Pro forma* decree sustaining the demurrer and dismissing the bill. The orator appealed.

John W. Gordon and *R. A. Hoar* for the orator.

The orator is entitled to a new trial on the ground of surprise. *Bradley Fertilizer Co.* v. *Fuller*, 58 Vt. 315; *Hoskins* v. *Hattenback*, 14 Ia. 314; *Delmas* v. *Margo*, 25 Tex. 1: 78 Am. Dec. 516 and note; *Fretwell* v. *Laffoon*, 77 Mo. 26; *Russell* v. *Reed*, 32 Minn. 45; *Farnham* v. *Jones*, 32 Minn. 7; *Goldstein* v. *Lowther*, 81 Ill. 399; *Barnes* v. *Milne*, Rich. Eq. Cas. 459: 24 Am. Dec. 422; *Oliver* v. *Pray*, 4 Ohio 175: 19 Am. Dec. 595 and note; *Beckwith* v. *Middlesex*, 20 Vt. 593; *Dow* v. *Hinesburgh*, 1 Aik. 35; *Stanton* v. *Bannister*, 2 Vt. 464.

In such cases, the statute of limitations having run at law, equity will relieve. III Graham & Waterman, New Trials, 1531; *Delmas* v. *Margo*, 25 Tex. 1; *Parshall* v. *Klinck*, 43 Barb. 203; *Martin* v. *Clark*, 1 Hemp. 259; *Knifong* v. *Hendricks*, 2 Gratt. 212: 44 Am. Dec. 385; *Deputy* v. *Tobias*, 1 Blackf. 311: 12 Am. Dec. 243.

Equity will relieve against perjury in a case like the present. *Peagram* v. *King*, 2 Hawks 605: 11 Am. Dec. 793; *Dyche* v. *Patton*, 3 Jones, Eq. 332; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch 332.

J. P. Lamson and *E. W. Bisbee* for the defendants.

ROWELL, J. The question arises on demurrer to a bill for relief from a judgment rendered on a verdict obtained by perjury in a suit in favor of the defendants against the orator for false warranty of the title of a horse that he sold

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to them at sheriff's sale on an execution against McKane. The main issue tried in that case was, as alleged in the bill, whether McKane's wife bought and owned the horse, and whether Mann Bros. acquired a legal title thereto by purchase from her. She testified that she bought the horse with money that she inherited from her father's estate, and sold it to Mann Bros. This testimony both surprised and defeated the orator, and when it was too late to petition at law for a new trial, he discovered and can prove that it was wholly and purposely false. But the bill does not implicate the defendants in the fraud otherwise than by alleging that the orator is informed and believes that Mann Bros. were in collusion and fraudulent combination and conspiracy with McKane and his wife and the defendants to defraud and defeat him in that suit, and that Mann Bros. and the defendants knew, or ought to have known, that Mrs. McKane's testimony was knowingly and purposely false. But the allegation on information and belief is obviously not sufficient to implicate the defendants; and the allegation that they knew, or ought to have known, charges neither with certainty, and if the demurrer is taken as admitting the averment, it can at most be said that they ought to have known but did not, for as here is an equipoise, no intendments on demurrer are to be made in favor of the pleader's case that do not naturally result from the allegation. Story's Eq. Pl. Redf. Ed. § 452a; *Simpson* v. *Fogo*, 6 Jur. N. S. 949.

There was, then, no subornation of perjury by the defendants, nor even knowledge on their part that the testimony was false, and it was relevant to the main issue tried, which was decided against the orator, who had his day in court.

It is said in *Burton* v. *Wiley*, 26 Vt. 430, that the early English cases, and some of the American cases, go upon the ground that a bill will be entertained for a new trial in an action determined at law upon much the same grounds that

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new trials are granted at law, when the courts of law have no means of granting such trials, either for want of authority or from lapse of time; but that in this State the rule has been established on a much narrower basis, and that the party must have failed of obtaining redress in the suit at law by the fraud of the other party or by inevitable accident or mistake without fault on his part or that of his attorney. This is said to be the doctrine of the best considered and more recent cases. It is not enough to show that injustice has been done; it must appear that it was done in circumstances that authorize a court of equity to interpose,—that afford ground of equity jurisdiction. *Bateman* v. *Willoe*, 1 Sch. & Lef. 201. But surprise is not such a ground, unless accompanied with fraud and circumvention. *McDaniels* v. *Bank of Rutland*, 29 Vt. 230. Nor is the lapse of the statutory period for petitioning at law for a new trial. *Burton* v. *Wiley*, above cited.

The maxim that fraud vitiates every proceeding must be taken to apply to cases in which proof of fraud is admissible. But when the same matter has been actually tried, or was so in issue that it might have been tried, it is not again admissible, for the party is estopped to set up such fraud, as the judgment is the highest evidence and cannot be contradicted. *Shaw*, C. J., in *Greene* v. *Greene*, 2 Gray 361, 366.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment or the decree was rendered. This is the precise point ruled in *United States* v. *Throckmorton*, 98 U. S. 61. This rule is based upon the maxims that it is for the public good that there be an end of litigation, and, that a man shall not be twice vexed for one and the same cause. The court there says, that when by reason of something done by the successful party to the suit there was in fact no

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adversary trial nor decision of the issue in the case, equity will grant relief; but that it is well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed. This has long been the settled doctrine in this State. Thus, in *Emerson* v. *Udall*, 13 Vt. 477, 483, it was said that notwithstanding some early cases to the contrary, it was then well settled that a court of equity will not examine into the foundation of a judgment of a court of law upon any ground that either was, or might have been, tried in such court, but that equity will sometimes grant relief when a party, by accident or mistake without his own fault, or by the fraud of the other party, has failed of an opportunity to present his case, and also when his defense is purely of an equitable character, and therefore could not avail at law. Beyond this, the court said, it was not aware of any good ground on which equity could enjoin a judgment at law, although cases were to be found, but not of very high authority, that have gone somewhat further.

So in *Fletcher* v. *Warren*, 18 Vt. 45, it is said that the fact that a judgment at law has worked injustice between the parties is not, of itself, enough to authorize a court of equity to grant relief, for suggestions of injustice can always be made, and if it was competent for equity to interpose on such grounds alone, no determination at law would ever be final; that it would, moreover, be a manifest repugnancy in any system of jurisprudence that the decisions of one ultimate and final jurisdiction should be subject to the revision and correction of another; that therefore it is only on collateral grounds, not passed upon by the court of law, that a court of equity can proceed in such cases, and then it acts upon the conscience of the party in fault, and not upon the court of law; and hence that it is usual to allege and show that the party seeking relief has a just defense, of which, through the fraud or wrongful act of the other party, he was unable to avail himself at the trial.

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Pico v. *Cohn*, 91 Cal. 129: 25 Am. St. Rep. 159, is a very strong case to the same effect. It decides that neither a judgment nor a decree will be set aside in equity on account of any fraud that is not extrinsic or collateral to the question examined and determined in the original action, and that a fraud is not extrinsic or collateral within the meaning of the rule, unless it prevents the party from having a trial. There the successful party bribed a witness to swear falsely, and it was claimed that the bribery was the fraud, and as it was not, and could not have been, the subject of investigation at the trial, it was extrinsic and collateral, and brought the case within the rule. But the court held that the production of the perjured testimony was the fraud, and that the means by which the witness was induced to swear falsely was but an incident.

In a note to that case Mr. Freeman says there is little or no doubt of the truth of the proposition there stated, but he thinks that subornation of perjury is an extrinsic or collateral fraud within the meaning of the rule, and ought to be held such; but he does not intimate that the credibility of testimony relevant to the issue tried is extrinsic or collateral, as it clearly is not. I Herman, Estop. and Res. Judic. § 394.

See monograph note to *Oliver* v. *Pray*, 19 Am. Dec. 603, on the power of a court of equity to relieve from judgments at law.

If the bill can be treated as a bill of discovery concerning the supposed chattel mortgage of the horse from McKane to Mann Bros., it cannot be sustained as such, for the orator has no title nor interest in the matter respecting which discovery is sought, as the judgment at law finally and conclusively settles that matter against him.

Although the demurrer is only to the amendment of the bill, it was treated in argument as being to the whole bill, and hence we have so treated it.

Decree affirmed and cause remanded.

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EUGENE R. DARLING *vs.* O. C. CLEMENT.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and START, JJ.

Slander—Prefatory Averment—Meaning of Words—Damage to One in his Occupation—Costs.

When the actionable quality of words arises from extrinsic circumstances, a prefatory averment of the existence of such circumstances is necessary. But it is otherwise when the actionable quality inheres in the words themselves; the meaning claimed may then be ascribed by the innuendo, the truth of which must be determined by the jury.

Words, in slander, are to be taken neither *in mitiori sensu* nor *in malam partem*, but in their plain and natural meaning.

The words here charged, which impute the stealing by the plaintiff of wood from the land of the defendant, naturally mean the felonious taking of wood cut down, and not a mere trespass in respect to standing trees.

A count which declares upon three sets of words spoken at different times on the same day to the same persons concerning different subjects, is bad for duplicity.

If the natural and reasonable tendency of the words charged is to injure the plaintiff in his occupation, it is not necessary to allege special damage nor that the words were spoken of the plaintiff in relation to his business.

Words charging the plaintiff with habitual intemperance have a natural tendency to injure him in his business of keeping and instructing boys, and are, therefore, actionable; but otherwise of words imputing bad financial credit.

Words charging the plaintiff with permitting the boys to steal the defendant's apples, though not actionable *per se* as amounting to a charge of "being privy and consenting to larceny," are actionable as having a natural tendency to injure the plaintiff in his said business.

For the same reason a charge of insolvency against one engaged in buying and selling live stock and farm produce, is actionable without an averment of special damage.

A demurrer to a declaration that is general to all the counts by enumeration and special to some of them, is equivalent to a separate demurrer to each count.

Both parties having excepted, the plaintiff, obtaining a reversal upon one point, is entitled to costs in this court.

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SLANDER. Heard on demurrer to the declaration at the June Term, 1896, Orange County, *Munson*, J., presiding. The first and second counts were adjudged insufficient, and the plaintiff excepted. The third count was adjudged sufficient and the demurrer was overruled as being to the whole declaration. The defendant excepted.

The demurrer was general to all the counts by enumeration and special to the second and third. The declaration is sufficiently stated in the opinion.

Darling & Darling for the plaintiff.

The words alleged in the several counts are actionable *per se*, and special damage need not be alleged. Odgers, Libel and Slander, 17, 53; Cooley, Torts, 195; *Onslow* v. *Horne*, 3 Wils. 186; *Moore* v. *Francis*, 121 N. Y. 199.

The words set forth in the first count amount to an accusation of larceny, a felony at common law. Words, in slander, are to be understood in their plain and popular sense. It is not necessary that they should charge the commission of a crime with technical accuracy. *Gorham* v. *Ives*, 2 Wend. 534; *Lewis* v. *Hudson*, 44 Ga. 568; *Miller* v. *Miller*, 8 Johns. 74; *Kennedy* v. *Gifford*, 19 Wend. 296; *Goodrich* v. *Woolcott*, 3 Cow. 231; *Wilson* v. *McCrory*, 86 Ind. 170; *Roberts* v. *Camden*, 9 East 93.

The doctrine of *in mitiori sensu* is exploded. *Demarest* v. *Haring*, 6 Cow. 76.

The words set forth in the first count charge the crime with sufficient precision. *Dunnell* v. *Fiske*, 11 Met. 551; *State* v. *Parker*, 34 Ark. 158; *Baker* v. *Pierce*, 6 Mod. 23; *Haag* v. *Cooley*, 33 Kan. 387.

The words being capable of the construction ascribed by the innuendo, it is for the jury to say in what sense they were used. *Smith* v. *Miles*, 15 Vt. 245; *Goodrich* v. *Woolcott*, *supra*; *Dunnell* v. *Fiske*, *supra*; *Demarest* v. *Haring*, *supra*; *Gibson* v. *Williams*, 4 Wend. 320; *Ex parte Baily*, 2 Cow. 479; *Royce* v. *Maloney*, 57 Vt. 325: 58 Vt. 437.

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The words set forth in the second and third counts are actionable *per se*, for they tend to injure the plaintiff in the occupation in which he is alleged to be engaged. *Moore* v. *Francis*, 121 N. Y. 199; Odgers, Libel and Slander, 65, 74; *Brandrick* v. *Johnson*, 1 Vict. L. R. C. L. 306; *Drake* v. *Hill*, T. Raym. 184; *Sewall* v. *Catlin*, 3 Wend. 291; *Phillips* v. *Hœfer*, 1 Pa. St. 62.

Where the words are such as necessarily to injure the plaintiff in his occupation no allegation of such damage is necessary. *Chaddock* v. *Briggs*, 13 Mass. 248; *Stanton* v. *Smith*, 2 Ld. Raym. 1480; *Jones* v. *Littler*, 7 M. & W. 423; *Reeve* v. *Holgate*, 2 Lev. 62.

The charge that the plaintiff permitted the boys to steal the defendant's apples amounted to an accusation of "being privy and consenting to larceny." *Mot* v. *Butler*, Cro. Car. 236.

The words set forth in the second count all relate to the same subject, namely, the plaintiff's business and his fitness therefor. They were spoken on the same day and to the same person and, therefore, constitute but a single cause of action and are properly included in one count. *Hoyt* v. *Smith*, 32 Vt. 304; Anthon's Prec. * 307.

If necessary, the second count may be considered as three separate counts with faulty introductions and conclusions which are aided by this demurrer. *Hooker* v. *Smith*, 19 Vt. 151; I Chitty Pl. 663; Anthon's Prec. * 307.

R. M. Harvey and *John H. Watson* for the defendant.

The first count is insufficient unless the words charged are actionable *per se* as imputing an infamous crime. *Redway* v. *Gray*, 31 Vt. 292; *Posnett* v. *Marble*, 62 Vt. 481. There is no averment of extrinsic matter and the words themselves when taken together amount to an accusation of a trespass merely. *McCourt* v. *People*, 64 N. Y. 586; *Allen* v. *Hillman*, 12 Pick. 101; *Ogden* v. *Riley*, 14 N. J. L. 186; *Brite* v. *Gill*, 2 T. B. Monroe 65: 15 Am. Dec. 122;

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Wing v. *Wing*, 66 Me. 62: 22 Am. Rep. 548; IX Bacon's Abr. 83-4; *Merritt* v. *Dearth*, 48 Vt. 65; *Stees* v. *Kemble*, 27 Pa. 112; *Glines* v. *Smith*, 48 N. H. 259; *Fitzgerald* v. *Robinson*, 112 Mass. 371.

There being no averments giving the words other and sinister meaning, they must be understood in their most innocent sense. *Merritt* v. *Dearth*, 48 Vt. 65; *Sheridan* v. *Sheridan*, 58 Vt. 504. The innuendo cannot extend the sense of the words beyond their own meaning. *Fitzsimmons* v. *Cutler*, 1 Aik. 33.

"Wood" means timber growing as well as cut. Worcester's Dict. At common law the severing and carrying away of a tree is not larceny, but trespass merely. II Bish. Crim. Law, §§ 762-3; *Stitzell* v. *Reynolds*, 67 Pa. 54; *Ogden* v. *Riley*, 14 N. J. L. 186. V. S. 4946 does not aid the plaintiff because the elements of that crime are lacking in the words charged.

The second count is bad for duplicity. Towns., Slander, § 347; *Rathbun* v. *Emigh*, 6 Wend. 407; *Milligan* v. *Thorn*, 6 Wend. 412; *Dioyt* v. *Tanner*, 20 Wend. 190; *Churchill* v. *Kimble*, 3 Ohio 409; *Cracraft* v. *Cochran*, 16 Iowa 301; *Patterson* v. *Wilkinson*, 55 Me. 42: 92 Am. Dec. 568. *Hoyt* v. *Smith*, 32 Vt. 304, is the most extreme case in the plaintiff's favor but is distinguishable from the present in that the words there charged all related to the same subject.

The third count is insufficient for want of an averment of special damage. The count cannot assume that credit was important to the business. *Ostrom* v. *Calkins*, 5 Wend. 263; Newell, Slander, 192-3.

ROWELL J. The words declared upon in the first count are, "I will sue him (innuendo the plaintiff) for stealing lumber from my land. One day Gene Darling wanted some wood, so he ordered Mel. Dickinson to get some. Mel. asked Darling where he should get it. Darling said, 'Down by Clement's near the swamp.' Then Mel. said, 'If you want to get wood from Clement's place, you better get some one

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else to get it.' Then Darling said, 'That is all right, we often get wood from there.'" Innuendo, meaning and insinuating thereby, and by the hearers understood to mean and insinuate, that the plaintiff had been guilty of stealing wood from the lands and premises of the defendant. It is claimed that this language is not actionable *per se*, for that the words, "I will sue him for stealing lumber from my land," are so qualified by the subsequent words that, taking them together, they do not impute larceny, but only a trespass, as they must be understood to mean, wood growing and not cut down, and therefore not the subject of larceny; and that, as there is no prefatory averment diverting the meaning to a felonious taking, the innuendo is too large, as it undertakes such diversion, which is beyond its function. On the other hand some claim is made that the subsequent words stand by themselves, and are not the reason of the former speech nor any diminution of it, but merely in addition to it.

It is true that when the actionable quality of the words arises from circumstances extrinsic of them, a prefatory averment is necessary, to show that such circumstances existed and to connect the words with them. But when the actionable quality inheres in the words themselves, and does not arise from extrinsic circumstances, no prefatory averment is necessary; the innuendo may then ascribe the meaning claimed, and it is for the jury to determine the truth of the innuendo, if the words are capable of the meaning ascribed. 1 Am. Lead. Cas. 4th ed. 140.

Here, we think, the actionable quality inheres in the words themselves, taken together, and that no extrinsic facts are necessary to develop the imputation of larceny. At one time, before Lord Holt's day, the rule in actions of slander was, that the words should be construed *in mitiori sensu*, the object being to discourage litigation. Afterwards, in some of the cases, it was said that the words should be taken *in malam partem*, the policy being to

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afford legal remedy and thereby prevent violent redress. But the rule now is, that the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard them. That is to say, the ordinary signification of the words and the understanding of the hearers, fix the meaning in slander. 1 Am. Lead. Cas. 4th ed. 131.

Now the natural and most obvious meaning of the word *steal* is, the felonious taking of property, or larceny. But it may be qualified by accompanying words so as to show that such was not the meaning. Thus, to say of one, "He stole apples from my trees," imputes a trespass, not larceny, and the words are not actionable. Otherwise to say, "He stole apples from my bin." But the word "stealing" in the language here declared upon is not thereby qualified so as to take away the *prima facie* imputation of larceny, which the defendant may disprove by bringing forward matters of fact to show that such was not the imputation.

The stealing of wood from the lands and premises of the defendant is the imputation alleged. One definition of the word *wood* is, the hard substance of a tree or shrub as cut for use. This is its most common meaning. The old maxim is, *arbor dum crescit, lignum dum crescere nescit*; a tree while it grows, wood when it cannot grow, that is, when it is cut down. Thus, in *Minors* v. *Leeford*, Cro. Jac. 114, the court thought the words, "Thou hath stolen a tree," not actionable, for *arbor dum crescit.* While in *Lo* v. *Sanders*, Cro. Jac. 166, the words, "Thou hath stolen my wood," were held actionable, for *lignum dum crescere nescit.* "You stole my boxwood and I can prove it," are actionable, for they may be understood to impute felony. *Baker* v. *Pierce*, 2 Salk. 695, but better reported in 6 Mod. [23]. *Short's* case, Noy, 114, is this: "Thou hast stolen my timber," are

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actionable, for they shall not be intended of trees growing, for, by the whole court, they are then timber trees. In *Drake* v. *Whitacre*, Style, 24, the words were, "Margaret Whitecre (innuendo the plaintiff) did steal my wood, and I will send her to Bridewell." After verdict for the plaintiff it was moved in arrest that the words were not actionable, for doubtful words as these ought to be taken *in mitiori sensu*, and wood here might be understood, standing wood, and not wood cut down, and so it could not be theft but a trespass. On the other side it was answered, that wood should be understood, wood cut down and not standing, and being coupled with the words, "Margaret Whitacre is a thief," which are felonious words, they should be interpreted equally felonious. *Ayre* v. *Higgins* was cited to prove it, where it was adjudged that the words, "He is a thief and hath stolen my corn," should be understood of corn cut down and not standing, and therefore actionable. *Rolle*, Justice, said it was a strong case that the action would lie, but he arrested judgment till it was moved again, when the court held that the first words were actionable, but whether, coupled with the other words, they were actionable, the court was divided, *Bacon* against the action and *Rolle* for it. In *Phillips* v. *Barber*, 7 Wend. 439, the words, "You have stolen my wood," were held actionable.

We hold, therefore, that the first count is good.

The second count is bad for duplicity. It declares upon three sets of words, spoken at different times on the same day to the same person concerning different subjects, namely, the plaintiff's habitual intemperance, his lack of riches with many creditors, and his knowing that certain boys in his care and control were accustomed to steal defendant's apples and not trying to stop them. The plaintiff's trade and business and his fitness therefor are not, as claimed, the subject of the words, though they may have been their object, although they are not connected therewith by averment nor implication. Whether it would

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have been proper, had the different sets of words related to the same subject, to join them in one count, we need not decide. That was held proper in *Hoyt* v. *Smith*, 32 Vt. 304. But no case goes the length of holding that words spoken at different times, imputing different charges, can be thus joined.

It is claimed that this count is also defective, for that the words alleged are not actionable, there being no special damage alleged, unless they were spoken of the plaintiff in relation to his trade and business; and that in order to make them actionable on that account, it must be alleged that they were so spoken. But such an allegation is not necessary if the natural and reasonable tendency of the words is to injure the plaintiff in his trade and business. *Lumby* v. *Allday*, 1 C. & J. 301; *Miller* v. *David*, L. R. 9 C. P. at p. 125: 1 Am. Lead. Cas. 4th ed. 99. The count avers that before and at the time in question, the plaintiff owned and occupied a valuable place in Corinth, known as "Maplewood Farm," and that divers wealthy men of New York City had been and were used and accustomed to entrustand commit the care of their minor sons to him for the purpose of having them boarded and instructed by him at said "Farm" during the summer season, whereby he had made great gain and profit. The words alleged are, "When he could not suck his mother any more, he sucked the rum-bottle, and has been sucking it ever since." Innuendo that plaintiff was and is addicted to intemperance in the use of intoxicating liquor. "He brings these boys here, and he gets a high price for boarding them, and he pretends to be rich, but I can count twenty-five men in Cookville that he owes money to, and if he should die today there would not be a cent left to pay his debts." Innuendo that plaintiff is not a person of good credit among his neighbors. "These boys come up here year after year and steal my apples, and he knows it and does not try to stop it, but he won't bring them much longer." Innuendo that plaintiff allowed said boys, while under his control, to commit larceny.

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Do these words, or any and which of them, have a natural and reasonable tendency to injure the plaintiff in his business of boarding and instructing said boys?

Bayley, B., said in *Lumby v. Allday*, above cited, that every authority he could find, either showed the want of some general requisite, as honesty, capacity, fidelity, etc., or connected the imputation with the plaintiff's office, trade, or business; and therefore he held that to say of a clerk of a gas company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with strumpets," was not actionable, because the imputation did not imply any of the qualities that such a clerk ought to possess.

So to say of a stay-maker in his trade, that his business does not keep him, but the prostitution of a woman in his shop, is not actionable, for it was considered that the words did not touch him in his business, but were only a general imputation on his moral character. *Brayne v. Cooper*, 5 M. & W. 249.

But if the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, or drunkenness or immorality to a clergyman, they are actionable, and there need be no colloquium of the profession or business. *Stanton* v. *Smith*, 2 Lord Raym. 1480; *Jones* v. *Littler*, 7 M. & W. 423; *Chaddock* v. *Briggs*, 13 Mass. 248.

Concerning the imputation of habitual intemperance, as to which the innuendo is good, it needs no argument to show that its natural tendency is to injure the plaintiff's character in respect to the business in which he was engaged, for it implies the want of sobriety, a quality that the keeper and teacher of boys ought to possess.

But such cannot be said to be the natural tendency of the words innuendoed to impute bad financial credit to the plaintiff among his neighbors, for they do not touch him in

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his said business, nor imply the want of any quality that the conductor of such a business ought to possess. It is not like imputing insolvency or want of credit and respectability to one to whom, in the prosecution of his business, credit is of importance, for such an imputation would necessarily tend to injure him in his business; but here it does not appear that credit was of importance to the plaintiff, and the character of the business is not such as to imply it.

The words about the boys stealing apples are not actionable *per se*, as claimed, as amounting to a charge of "being privy and consenting to a larceny," for they are not susceptible of imputing criminal complicity in that matter. Neither a mere presence, nor presence combined with a refusal to interfere or with concealing the fact, nor a mere knowledge that a crime is about to be committed, nor a mental approbation of what is done, while the will contributes nothing to the doing, will create guilt. There must be something further, some word, or act, or, in the language of *Cockburn*, C. J., one to be a party in another's crime, "must incite, procure, or encourage the act." I Bishop's New Crim. Law, § 633.

But these words touch the plaintiff in his character of teacher, as they clearly import that he is not a suitable person to have the care and instruction of boys, because he is so indifferent to their moral welfare that he does not even try to restrain then from the commission of crime; and as they show on their face that they were spoken of him in said business, they are actionable, without colloquium of the business or the allegation of special damage.

The third count alleges that the plaintiff was engaged in buying and selling horses, cattle, sheep, and other live stock, and hay, grain, and other farm produce, and other articles, and that the defendant, contriving to injure him in that business, said of him that "he pretends to be rich, but I can count twenty-five people in Cookville that he owes

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money to, and if he should die today there would not be a cent left to pay his debts." This language clearly imports that the plaintiff was insolvent, and it is actionable without colloquium of the business or allegation of special damage, as its natural and necessary tendency is to injure the plaintiff in said business, for although there is no averment that pecuniary credit and responsibility are of importance to him therein, yet it is of such a character that they necessarily must have been of importance to him, as much as they are to a merchant, and the precedents for imputing bankruptcy to a merchant or other trader do not contain such an averment. *But the declarations in some of the cases do; as, in *Lewis* v. *Hawley*, 2 Day. 495: 2 Am. Dec. 121, where it was held actionable, without special damage being proved, to say of a drover, whose business it was to buy cattle, drive them to market and sell them, that he was a bankrupt, and not able to pay his debts. 9 English Ruling Cases, 13. In *Davis* v. *Ruff*, Cheves's Law, 17: 34 Am. Dec. 584, it was held that words impugning the solvency of a person and affecting his credit, were actionable, though not spoken of him in relation to his trade or business. But there was an allegation of special damage.

The demurrer is general to all the counts by enumeration, and special to the second and third. It is equivalent, therefore, to separate demurrers to each count. This is important only as affecting the form of judgment.

The judgment that the first count is insufficient is reversed, the demurrer thereto overruled, and that count adjudged sufficient. The judgment that the second count is insufficient and the third count sufficient, is affirmed.

Both parties excepted, and the plaintiff has prevailed to the extent of obtaining a reversal as to the first count. This entitles him to costs in this court.

Cause remanded.

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STARACE *vs.* ROSSI.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Intoxicating Liquor—Recovery for—Wine, Intoxicating—Purchase for Lawful Use—Original Packages.

It is unlawful to sell intoxicating liquor in this State, except as provided by statute, although the purchaser intends to make, and does make, a lawful use of it.

That wine is intoxicating is a matter of common knowledge and need not be proved.

The defendant's order having been taken in this State by the plaintiff's agent and by him transmitted to the plaintiff in New York, where it was accepted, the contract was, in part, made in this State, and therefore unenforceable.

The sale being thus unlawful was none the less so that the liquor came into this State in the original packages.

ASSUMPSIT. Heard upon an agreed statement of facts at the September Term, 1896, Washington County, *Taft*, J., presiding. Judgment for the defendant, The plaintiff excepted.

Richard A. Hoar for the plaintiff.

W. A. Lord for the defendant.

ROWELL, J. The wine for the price of which recovery is sought, was Italian wine, not made in this State, and commonly known as "sour wine." The like cannot be bought at the town agencies in this State, but only of Italian dealers, and it is used exclusively by Italians for culinary and drinking purposes; and the wine in question was bought by the defendant for those purposes, and not for sale, gift, nor distribution contrary to law, and was not thus disposed of. The order for it was taken at Barre by a broker who was plaintiff's agent in the transaction, and was sent to, and accepted by, the plaintiff in New York, where he lived.

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It is unlawful to sell spirituous liquor in this State, except as provided by statute, although the purchaser intends to make, and does make, a lawful use of it. V. S. 4460. This case does not come within the exception, but on the contrary, plaintiff's agent incurred a penalty for his part in the transaction. V. S. 4505. But it is said that it does not appear that the wine was spirituous or intoxicating, as it is not so stated in the agreed facts.

There is a class of liquors that everybody knows to be intoxicating. Rum, gin, and brandy are of that class; and therefore an indictment for selling them contrary to law need not allege that they are intoxicating. *State* v. *Munger*, 15 Vt. 290. Nor need they be proved to be intoxicating. *Commonwealth* v. *Peckham*, 2 Gray 514; *Snider* v. *State*, 81 Ga. 753: 12 Am. St. Rep. 350. In *State* v. *Barron*, 37 Vt. 57, it is said that wine belongs to that class, as it is universally acknowledged to be intoxicating, and held that ale comes within the prohibition of the statute for the same reason, and that affirmative proof that it is intoxicating is not necessary. In *Wolf* v. *State*, 59 Ark. 297: 43 Am. St. Rep. 34, the court took judicial notice that wine is intoxicating, as that is a matter of common knowledge. To the same effect, see 11 Am. and Eng. Ency. of Law, 582; note to *Lanfear* v. *Mestier*, 89 Am. Dec. 694; *Jones* v. *Surprise*, 64 N. H. 243.

The statute prohibits recovery for intoxicating liquor or the value thereof, except such as is sold or purchased in accordance with its provisions. V. S. 4464. But it is claimed that the contract for this liquor was made in New York, and that therefore recovery can be had. The answer to this is, that the contract was in part, at least, made in this State, and that prevents recovery as effectually as though it had been wholly made here. *Backman* v. *Wright*, 27 Vt. 187; *Backman* v. *Mussey*, 31 Vt. 547.

But, it is said, if this is so, still it must be taken from the agreed facts that the wine came here in original packages,

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and therefore could lawfully be sold here. This contention has no force in view of the Act of Congress of August 8, 1890, which provides that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. Sts. 1st Session 55th Congress, 1889-1890, chap. 728.

After the passage of this Act, to remove all doubt about the validity of our statutes theretofore enacted relating to intoxicating liquors or liquids as applied to such liquors or liquids when brought into the State in certain circumstances, and to the end that the due administration of justice should not be thereby hindered, delayed, nor thwarted, the Legislature re-enacted all of those statutes that had not been repealed. Acts of 1890, No. 40. But such re-enactment was not necessary. *In re Rahrer*, 140 U. S. 545, 562.

Judgment affirmed.

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STILLMAN LAZELLE *vs.* THE TOWN OF NEWFANE.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Contributory Negligence.

The plaintiff, to establish that he was in the exercise of due care, need not produce an eye witness to the accident. It is sufficient that the circumstances justify the inference.

ACTION ON THE CASE for damages sustained from the insufficiency of a bridge. Plea, the general issue. Trial by jury at the March Term, 1896, Windham County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of the testimony the defendant moved for a verdict on the ground that there was no evidence tending to show that the plaintiff was in the exercise of due care. The motion was overruled and the defendant excepted.

The evidence on the part of the plaintiff tended to show that he started from his home, about one mile from the place of the accident, with a team, consisting of a horse, harness and single buggy, and his mother riding with him; that he stopped at a blacksmith shop about fifty rods from the bridge and had some work done; that everything about the team then appeared to be sound and right; that he drove from the shop to a neighbor's in an opposite direction from the bridge and then back by the shop toward the bridge, the team still appearing to be all right, and was immediately afterward seen about half way from the shop to the bridge driving the horse, which was then walking; that the plaintiff was then fifty-three years old, accustomed to driving horses and the particular one then in use, and that the horse was gentle, manageable and safe. There was

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no evidence tending to show what happened after the plaintiff was last seen as before stated until he was found unconscious under the bridge, except the circumstances stated in the opinion. The mother was instantly killed.

Waterman, Martin & Hitt and *K. Haskins* for the defendant,

Clarke C. Fitts and *L. M. Read* for the plaintiff.

TAFT, J. The plaintiff was under the burden of proving that the proximate cause of his injury was the result of the negligence of the defendant, and that he was not guilty of contributory negligence in any degree.

The defendant concedes that if there was any evidence relating to the conduct of the plaintiff at the time of the accident, that the cause was properly submitted to the jury. Whether there was or not is the only question before us. The last seen of the plaintiff prior to the accident, he was twenty-five rods from the bridge upon which the accident occurred, driving toward it with a gentle, manageable and safe horse. He drove on the bridge when his horse stopped, and backed, cramping around and over a log used as a railing on the side of the bridge, went over the log and down on the rocks in the bed of the stream below the bridge. The plaintiff could remember nothing of what transpired at the time of the accident, and no one else now living saw it.

To entitle the plaintiff to recover, it was not necessary that there should have been an eye witness to the transaction, who can be called to testify to the circumstances attending the accident; the direct testimony of a person witnessing the accident is not required. The manner of the accident, the cause of it and the fault, if any of either party, may be inferred from the facts shown and detailed by the witnesses. The plaintiff was last seen twenty-five rods from the bridge; the wheel tracks upon the bridge indicated that he had driven upon it without meeting with any trouble, when his horse backed, and cramping the wagon, backed it over the

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log lying on the side of the bridge. The jury could well find from the testimony that the bridge was insufficient and out of repair in not having a sufficient railing, and that the want of it was the proximate cause of the accident and the town in fault in not having it. From the fact that as he approached the bridge, the horse was being properly driven, was then walking, and that he passed on to the bridge without trouble as indicated by the wagon tracks, and that then from some unknown cause the horse backed, cramping the wagon around and backing it over the log and down on the rocks in the bed of the stream, the jury might well infer that the plaintiff, presumably possessing the common instincts of self-preservation, did not contribute in any degree to the accident.

From the facts stated in the record, it is probable the horse was suddenly frightened, that as soon as he began to back, the wagon cramped and immediately went over the log lying on the side of the bridge, and on the rocks under the bridge; and that the accident occurred so suddenly that the plaintiff had no time to escape from the wagon, nor prevent being dashed upon the rocks below. They could infer from the circumstances shown by the testimony, the neglect of the town, the proximate cause of the accident, and that the plaintiff was without fault.

Judgment affirmed.

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ISAAC S. BORLEY *vs.* JAMES McDONALD.

January Term, 1897.

Present: TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Contract not to Compete—Liquidated Damages—Evidence to Vary Contract.

The defendant contracted with the plaintiff not to compete with him in certain business. *Held*, that the contract was broken when his partners, acting in the line of the partnership business, competed.

The contract being in writing and unequivocal, it was not competent for the defendant to prove that at the time of its execution the plaintiff understood it in a sense more favorable to the defendant than its legal effect.

The contract clearly providing for liquidated damages, it was not competent for the defendant to prove that at the time of its execution both parties understood that only actual damages could be recovered.

It was a clear case of liquidated damages, the sum provided for being so named and reasonable, while the actual damages would have been difficult or impossible to ascertain.

ASSUMPSIT. Heard upon the report of a referee and exceptions thereto at the September Term, 1896, Franklin County, *Ross*, C. J., presiding. The exceptions were overruled and judgment rendered for the plaintiff to recover the sum named as liquidated damages, with interest from the date of the writ. The defendant excepted.

Wilson & Hall for the plaintiff.

Farrington & Post for the defendant.

TYLER, J. It appears by the referee's report that the plaintiff had a large well-established and profitable fire, life and accident insurance business in St. Albans, representing twenty-three or more companies; that in the spring of 1888 the defendant entered his employment as a clerk in his insurance office, and that on October 28, 1889, while he was so employed, the parties entered into the following written contract with each other:

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"In consideration of the agreement of the said McDonald hereinafter contained, said Borley agrees to employ him, the said McDonald, in his insurance business for the term of one year from the 21st day of October, 1889, unless this contract is sooner determined by its terms or by agreement, at and for the sum of not less than fifty dollars per month, payable at the end of each and every month. And the said McDonald agrees for himself, his heirs and assigns, that in consideration of said salary of not less than fifty dollars a month, he will devote his time and energies to the insurance business of said Borley eight hours each day in such part of said insurance business as said Borley shall direct, and that in case of the determination of this agreement by its terms, by limitation, or for any cause, he will not, in the town of St. Albans, directly or indirectly, for the period of one year from the conclusion of service under the contract, solicit any insurance that shall at that time be held by said Borley from any party or parties whatsoever; and that he will not do any act or thing in advantage of the said Borley by reason of information gained in his service; and in case said McDonald shall violate this provision of this agreement he hereby agrees for himself, his heirs, executors, administrators and assigns, to forfeit and pay to said Borley the sum of five hundred dollars as liquidated damages to be recovered in an action of assumpsit. This contract to control as to the amount of damages. It is further stipulated and agreed that, in case either party shall be dissatisfied with the other, this contract may be determined so far as service and compensation are concerned, by giving notice to the other party in writing."

The defendant had no previous knowledge of the insurance business, but for some time before he left the plaintiff's service he had been the general manager of the business and had access to and knowledge of the insurance registers and other books kept by the plaintiff. He remained in the plaintiff's employment under the contract from its

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date until August 28, 1890, when for reasons not stated, the plaintiff discharged him.

September 25, 1890, the defendant, A. D. Tenney and S. S. Watson formed a partnership, and for the purpose of carrying on a like insurance business as equal partners, they bought and established a business in St. Albans and have ever since prosecuted it under the firm name of Tenney & Watson, their business being in active competition with the plaintiff's.

The plaintiff considered that the defendant's entering into this partnership was in violation of the contract and that he had otherwise broken it, and in January, 1891, brought a bill in equity against him and procured an injunction by which the defendant was enjoined from directly or indirectly prosecuting insurance business in violation of the written contract. Proceedings were subsequently instituted against the defendant for an alleged violation of the injunction; the matter was referred to a master who reported the facts to the court, whereupon the court of chancery, at the September Term, 1891, for the county of Franklin, considered and adjudged that the defendant had violated the injunction and was guilty of a contempt and imposed upon him the payment of a fine of fifty dollars and costs.

It is unnecessary to decide the question, which has been discussed by counsel, whether the decree of the chancellor in the proceeding against the defendant for violating the injunction is conclusive of a breach by him of the written contract, for the referee has found such breach as a fact from the evidence.

The fact of the defendant's entering into a partnership which was engaged in a business in competition with the plaintiff's, with the fact that the defendant's partners did at different times during the year solicit and obtain insurance business from parties in the town of St. Albans who were insured in the plaintiff's companies and known by the defendant's partners to be so insured, was a violation of

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the contract. In such case the act of each partner was the act of the partnership.

Evidence that the plaintiff understood at the time of making the contract that the defendant had a right to represent any insurance company and to solicit any insurance that was not held by the plaintiff at the time the defendant left the plaintiff's employment, and to solicit any additional insurance of parties that held insurance with the plaintiff, was inadmissible. The contract is clear and explicit upon this subject.

The referee also found a breach of the contract by the defendant in his soliciting and obtaining insurance of C. L. Moren.

The next question is whether the plaintiff shall recover the actual damages found by the master, or the sum of five hundred dollars named in the contract as liquidated damages.

It was clearly error for the referee to find from extrinsic evidence that when the parties entered into the contract they both understood that for a breach of it only actual damages would be recoverable. The contract was the best evidence of their understanding.

In *Barry* v. *Harris*, 49 Vt. 392, the defendant sold the orator a freight business over certain routes and gave a writing promising the orator that he would pay him five hundred dollars if the defendant re-engaged in that business. It was held that the damages were stipulated, upon the ground of the practical impossibility of ascertaining the damages consequent upon a breach of the contract, the reasonableness of the sum named and the purpose of the contract. The court said: "Contracts whereby a party agrees not to exercise his vocation for a limited time or in a particular place, under an obligation to pay a stipulated amount, have often, perhaps generally, been held to be contracts conditioned for the payment of liquidated damages rather than penalties. The difficulty of ascertaining the actual

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damages in such cases has doubtless led to this construction. They have been regarded in many cases as alternative contracts, giving the party the right to pay the sum named if he wishes to do the thing prohibited." It further said that when it is clear that the parties have agreed for themselves upon a definite sum as the measure of the damages, courts will not undertake to make new contracts for them. A similar case is *Cushing* v. *Drew*, 97 Mass. 445.

It was said in *Stevens* v. *Pillsbury*, 57 Vt. 205, that: "It has rarely been held that, in a contract by which a party has agreed to refrain from exercising a particular trade or profession within a named locality, and agreed upon the sum to be paid, if he breaks his agreement, that the sum thus agreed upon has been held other than liquidated damages," citing several authorities. One of the principal reasons given for this holding was the difficulty of measuring the damages. The same rule is given in *Chase* v. *Allen*, 13 Gray 42, and in *Hall* v. *Crowley*, 5 Allen 304. In 13 Am. & Eng. Ency. 854, numerous cases are considered and the rule stated that:

"It is now well settled that a sum, if it be at all reasonable, stipulated to be paid as 'liquidated damages' for the breach of a covenant, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are entirely uncertain, and cannot be ascertained upon an issue of fact."

"Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such a purpose will be treated as one for 'liquidated damages,' unless the intent be clear that it was designed to be only a penalty."

It is true that where the terms, "liquidated damages," and

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"penalty" are employed in the contract they will not always be conclusive, but the intention of the parties will be ascertained from the contract and the circumstances in which it was made, its real purpose and the difficulty in ascertaining the damages when it is broken. In this case, upon leaving the plaintiff's service the defendant entered into a competing business and broke his contract; it is practically impossible to ascertain the damages, and as was held in *Barry* v. *Harris*, considering the form of the contract, its evident purpose, and the reasonableness of the sum named, a case is clearly made of liquidated damages.

Judgment affirmed.

IN RE WILLIAM THAYER.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Habeas Corpus—Description of Offense in Mittimus.

The relator was committed upon a mittimus which described the offense as "owning, keeping and possessing intoxicating liquor with intent to sell the same contrary to law," but did not show that the conviction was a second conviction and for a first the sentence would have been excessive. *Held*, that the mittimus complied with the statute which required it to contain a description of the offense; but if not, that the relator should not be released, the judgment and sentence being legal.

HABEAS CORPUS to the Supreme Court for the County of Bennington.

The mittimus recited that the relator had been duly convicted of the crime of owning, keeping and possessing intoxicating liquor with intent to sell the same contrary to law.

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Clarence P. Niles for the relator.

Edward A. Bates, State's Attorney, for the State.

TYLER, J. The writ is granted upon the allegation in the petition therefor that the relator is imprisoned without authority of law as appears by the mittimus upon which he was committed. It is apparent that the sentence was excessive upon a first conviction for keeping intoxicating liquor with intent to sell the same in violation of law, and it does not appear from the description of the offense in the mittimus that it was a second conviction.

Form 55 V. S. provides for a description of the offense in the mittimus when the sentence is imprisonment in the House of Correction and fine, but it does not prescribe with what particularity the offense shall be described.

As the mittimus is only the warrant of authority to the officer to make the commitment and to the superintendent of the House of Correction to confine the prisoner, it would seem that a general description of the crime is all that the statute contemplates. In the form of mittimus for commitment to the Industrial School the direction is to "set forth the nature of the crime." It was held *In re Durant*, 60 Vt. 176, that a warrant issued upon an indictment need not describe the crime with particularity. In this case the crime is the same in essence whether it be upon a first or a subsequent conviction, but upon subsequent convictions the penalty is more severe than upon the first. Therefore we hold that the mittimus contains a sufficient description of the offense to answer the purpose for which it was issued.

But it would not avail the relator if the description were insufficient or incorrect. A good mittimus may be substituted at any time in place of a defective one, even after the issue of a writ of *habeas corpus*, and the relator would not be entitled to discharge. This is held in *Kelley* v. *Thomas*, 15 Gray 192, and in *People* v. *Baker*, 89 N. Y.

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461. In the latter case it is said that if the prisoner has been properly and legally sentenced to prison he cannot be released because of a defective mittimus; that when he is safely in the proper custody there is no further office for the mittimus to perform; that he is not detained by virtue of the mittimus, but by virtue of the judgment, a certified copy of the record of which can always be shown in justification of the detention.

It has also been held that a certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner without any warrant or mittimus. *Ex parte Wilson*, 114 U. S. 417; *People* v. *Nevins*, 1 Hill 154; *People* v. *McEwen*, 67 How. Pr. R. 105. See Church on *Habeas Corpus*, § 375, where this subject is discussed and the authorities collected; 9 Am. & Eng. Ency. 161. Church further says that if the certified copy of the minutes of the court, or certified copy of the judgment furnished to the keeper, is erroneous, or imperfectly describes the crime of which the prisoner was convicted, the keeper can, upon the return to a writ of *habeas corpus*, show by the records of the court what the precise crime was, and thereby that the sentence was valid and the imprisonment authorized. But it is not necessary to go to that extent in disposing of the case before us, for here the crime is sufficiently described in the mittimus, and if it were not, the certified copy of the judgment and sentence shows that the imprisonment is legal.

Judgment that the relator is not unlawfully restrained, that he be remanded to the former custody, and that the petition be dismissed.

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IN RE JOHN J. ENRIGHT.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Disbarment—Petition to Reinstate.

The true object of disbarment is not the punishment of the attorney but the efficiency of the court and the protection of the public. Courts are established to ascertain the truth as the foundation for a proper judgment, and an attorney is an officer of the court, pledged to its assistance and vouched for by it as worthy of confidence. When, therefore, an attorney has been removed for unfaithfulness to his trust, he is not to be reinstated merely upon the ground that he has been sufficiently punished, without any evidence of a change in his character.

PETITION to the Supreme Court to set aside its judgment of disbarment against the petitioner. The case is stated in the opinion.

Roberts & Roberts for the petitioner.

R. E. Brown, State's Attorney, *contra*.

ROSS, C. J. This is a petition of John J. Enright praying this court to set aside its judgment of disbarment rendered against him at its January Term, 1895. In it he sets forth the judgment of disbarment and refers to it, as found in 67 Vt. 351, and says, "that he has realized and appreciated, to the fullest extent, and with the most intense feeling, all the grave consequences of his removal; that he has suffered greatly from loss of business and the consequent taking from him of his means of livelihood that has been the result of it. * * * That to continue his punishment would be unnecessary to his discipline, or for public example, and would be unnecessarily severe for the offense charged." This is the only ground for relief set forth in his petition. In support of his petition he has filed petitions signed by a majority of

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the bar in every county of the State, and, in many instances, by nearly the entire bar of the county. These petitions are identical in form and language and state as the reason for supporting his petition, that they believe he "has been sufficiently punished for the cause for which he was removed, and that the ends of justice will be met if he is reinstated in said offices." These petitions of the bar, so numerously signed, demand, and have received, the careful consideration of this court. It is to be observed that the petition of Mr. Enright, and the petitions of the bar in support of it, all proceed upon the ground that the judgment of disbarment had for its sole object the punishment of Mr. Enright for the offense found against him, as an attorney, and that the punishment has been sufficiently severe for that single offense. The argument in the petitioner's behalf, by the oldest practicing member of the bar, has proceeded upon that ground alone. We do not doubt but that this court has the power, on a proper cause shown, to set aside the judgment of disbarment. To determine whether a proper cause is shown to set that judgment aside, we must consider the object and purpose of admission to the bar, and the scope and end to be accomplished by a judgment of disbarment. By admission to the bar, the applicant becomes an officer of the court, endowed with certain peculiar privileges which amount to a sacred trust. The oath of office places him under the highest obligation known to the law, among other things, to do no falsehood, nor to consent that any be done in court, that he will act in the office of attorney within the court, according to his best learning and discretion, with all good fidelity, as well to the court as to his client. The ultimate end sought to be accomplished by courts is, *to ascertain the truth in regard to the matter in controversy, and thereon adjudge and award to the parties their respective rights.* By becoming an officer of the court, as well as by his oath of attorney, he binds himself to put forth his best endeavors to accomplish these ends. Hence

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the wide scope and clear, searching provisions of his oath. The court is empowered, by rules, to make provisions for admission to the bar, only of such persons, in character and in knowledge, as will help the court in accomplishing the ends for which they are established. Among these rules,—and they would not accomplish the desired ends unless there was such a rule,—is one requiring that all applicants for admission shall establish that they are of good moral character. By his admission, the court endorse the applicant and hold him out as possessing the knowledge and character requisite to render him a worthy member of the bar. The ends to be accomplished through courts and its officers, the attorneys, being the establishment of the truth, in regard to the matter in hand, and the rights of the parties according to such truth, absolutely forbid the use of falsehood and deception in any of the proceedings connected therewith. When an attorney, one of its officers, is charged with unprofessional conduct and the court institutes inquiry in regard to the truth of the charge or charges, it is not mainly for the purpose of punishing him, but to ascertain whether he has violated the trust reposed in him. If the charges are found established and show such misconduct in his office as amounts to a violation of his trust, it then becomes the duty of the court to remove him from the office of an attorney, not primarily as a punishment to him, but as a protection to the court and community. Such is the scope of the judgment rendered in Mr. Enright's case, as found in the 67th Vt. It is not claimed that the misconduct there found established against him is untrue, nor that it did not go to the essence of his right to be an attorney, nor that he was unjustly removed from the office of attorney. The cause set forth, in all these petitions, does not touch the real grounds of the judgment of disbarment then rendered, nor furnish an adequate reason for disturbing it. That judgment establishes a serious impeachment of Mr. Enright's moral character, shown in

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his conduct as an attorney. To restore him to the office of an attorney for the reasons set forth in the petition would, in effect, abrogate the rule requiring the applicant for admission as an attorney to establish that he is of good moral character and furnish Mr. Enright an opportunity to repeat the commission of the same offense for which he was disbarred, and of other offenses of like character. If the present was his original application for admission to the bar, he could not be admitted, without more being shown than is contained in these petitions.

In these views all the members of the court concur.

The petition is dismissed.

LORD, STONE & CO. *vs.* WILLIAM H. BUCHANAN.

January Term, 1897.

Present: TAFT, ROWELL, TYLER, MUNSON and START JJ.

Trespass and Trover—General and Special Owners.

The special owner in possession of a chattel may recover in trespass or trover its full value against a stranger who unlawfully removes and converts it, the action being presumed to be with the consent of the general owner and the recovery being for his benefit to the extent of his interest. Consequently when such a recovery has been had it is a bar to an action of the same nature in behalf of the general owner.

TRESPASS AND TROVER. Plea, the general issue. Trial by court at the March Term, 1896, Washington County, *Ross*, C. J., presiding. Upon the facts found, which are sufficiently recited in the opinion, judgment was rendered for the defendant. The plaintiffs excepted.

T. R. Gordon and *G. W. Wing* for the plaintiffs.

Frank J. Martin for the defendant.

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TYLER, J. The plaintiffs sold a stove to a Mrs. Harroun by the following contract:

"BERLIN, VT., Sept. 27th, 1894.

For value received I promise to pay Lord, Stone & Co., or bearer, the first day of November, February, May and August next, thirty-two dollars with interest. The consideration of this note is one model crown portable cooking range which I have received of said Lord, Stone & Co.; nevertheless, it is understood and agreed between the undersigned and said Lord, Stone & Co. that the title of the above mentioned property does not pass to me, and until this note is paid the title to the aforesaid property shall remain with the said Lord, Stone & Co., who shall have the right, in case of non-payment at maturity of said note, without process of law, to enter and retake, and may enter and retake immediate possession of said property wherever it may be and remove the same.

MRS. J. HARROUN."

The defendant, as a public officer, in the foreclosure of a chattel mortgage against the vendee's husband, entered her dwelling-house, took the stove and duly advertised and sold it, the plaintiffs and the vendee making known to the defendant their respective claims and forbidding the sale.

The vendee sued the defendant in trespass for breaking and entering her dwelling-house, converting the stove to his use and depriving her thereof. Judgment was rendered for her to recover the value of the property and special damages, and no exception was taken. This suit was brought a few days later, is in trespass and trover, and special damages are alleged for that "the plaintiffs were for a long time prevented from transacting their necessary business and were put to great trouble and expense in being deprived of the stove."

During the trial the defendant conceded that the stove in controversy was not the one included in the mortgage and did not seek to justify the taking.

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The plaintiffs claim that they held the title to the stove, and as there was an overdue payment, that they were entitled to the possession; that the taking was an invasion of their right for which they should have at least nominal damages.

The vendee had possession of the property and an interest in it, and was entitled to recover the full value thereof and her damages. *Harker* v. *Dement*, 52 Am. Dec. 670 and notes; *White* v. *Bascom*, 28 Vt. 268. It is said in the latter case that naked possession is sufficient against all the world except him who has a superior title, and that where the suit is brought by the special owner, the law presumes it is by consent of the general owner who alone can interfere, and that what is recovered by the special owner above his interest is held by him in trust for the general owner.

The question is whether the plaintiffs can recover the damages which they suffered in consequence of the defendant's wrongful act. The rule is, that to entitle a plaintiff to maintain trespass or trover he must, at the time of the taking, have either the actual possession, or the title, with the right of present possession. *Hurd* v. *Fleming*, 34 Vt. 169. This rule is stated in substance in I Chit. Pl. 48, and it is there said that though the action may be brought by the general or special owner against a stranger, yet both actions cannot be supported at the same time, and that when the general owner has not the right of immediate possession, as where he has demised goods for a term, he cannot maintain trespass or trover even against a stranger; though if the injury were sufficient to affect his reversionary interest he may support a special action on the case; and a recovery in an action by the party having a possessory interest would be no bar to an action for an injury to the reversionary interest.

In this case the plaintiffs cannot recover the special damages found by the trial court for the reason that they are not declared for. They in fact only claim nominal damages, which would be for the unlawful taking of the

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property. For this they can have no recovery for the reason that the plaintiff in the other suit has had a full recovery upon this ground, and there cannot be two recoveries for the same taking.

If the plaintiffs had the right to repossess themselves of the property by reason of the vendee's failure to make payment, they waived that right and assented to the vendee's possession and suit, and cannot recover in this action.

Judgment affirmed.

BEVERWICK BREWING CO. *vs.* JOHN N. OLIVER.

January Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Liquor Contract Made Partly within this State—V. S. 4460, 4464.

The plaintiff's manager, while in Vermont, arranged with the defendant to send him in a particular manner such intoxicating liquor as he might order, such arrangement constituting a material part of the contract when the order was sent to and accepted by the plaintiff in New York, where the liquor was delivered. *Held*, that the contract was unenforceable as having been made partly within this State.

ASSUMPSIT for the price of lager beer. Plea, the general issue. Trial by jury at the March Term, 1896, Chittenden County, *Rowell*, J., presiding. Verdict directed and judgment rendered for the defendant. The plaintiff excepted.

The deposition of the plaintiff's manager was, in part, to the effect that he understood from the defendant that the lager was to be used by the latter only for legitimate purposes, in the manufacture of a light hop beer, and that the arrangement was that it should be shipped under the

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direction (L. W.) to save the defendant "the necessity of going into court and satisfying it that such lager was intended for a legal use."

D. J. Foster for the plaintiff.

Each order constituted a separate sale and the case is controlled by *Backman* v. *Mussey*, 31 Vt. 547.

R. E. Brown for the defendant.

The contract was made partly within this State and is illegal. V. S. 4464; *Backman* v. *Wright*, 27 Vt. 187; *Territt* v. *Bartlett*, 21 Vt. 184.

The plaintiff having knowingly done something to shield the defendant from investigation by the authorities, cannot recover. *Gaylord* v. *Soragen*, 32 Vt. 110; *Aiken* v. *Blaisdell*, 41 Vt. 655.

MUNSON, J. The manager of the plaintiff corporation deposes that the lager beer for which recovery is sought was sold and delivered to the defendant in Albany, New York, on orders received there from time to time by letter or telegram. But it further appears from his deposition that before any order was sent he had a conversation with the defendant at Burlington, in this State, in regard to orders which might thereafter be given; and the deposition seems fairly to mean, and is construed by counsel to mean, that the orders in question were sent pursuant to what was then said. In that conversation, although no order was given or promised, the defendant arranged to have whatever he might order shipped in a particular manner. This distinguishes the case from *Backman* v. *Mussey*, 31 Vt. 547. It is apparent that the orders afterwards sent and accepted did not embrace the whole agreement; for if they had been filled in disregard of the understanding had at Burlington, the defendant could have relied upon that as a part of the contract. See *Hobart* v. *Young*, 63 Vt. 363. It appears then from the plaintiff's own testimony that the contract was partly made in this State. It was therefore unenforce-

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able, and the court properly directed a verdict for the defendant. V. S. 4460, 4464. *Backman* v. *Wright*, 27 Vt. 187; *Starace* v. *Rossi*, 69 Vt. 303.

Judgment affirmed.

ARTHUR LYMAN, apt. *vs.* HARMON W. MORSE, exr. of J. W. TURNER, et als.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Construction of Codicil.

By his will the testator gave one-half of the income of his estate to his son Charles during his life and upon his death to the two sons of Charles, in equal shares, for ten years, when the principal was to become theirs; the other half of the income he gave to Arthur, a son of his deceased daughter, for ten years, when the principal was to become his unless he died before that time, in which case it was given to a charity. By a codicil he changed the foregoing will so as to give Charles two-thirds of the income and Arthur one-third. *Held*, that Arthur was entitled to one-third, only, of the principal.

APPEAL from the Probate Court for the District of Lamoille. Trial by court at the December Term, 1896, Lamoille County, *Rowell*, J., presiding. Judgment *pro forma* that the plaintiff take one-third, only, of the estate. The plaintiff excepted.

P. K. Gleed for the plaintiff.

Hogan & Royce and *Frank Plumley* for the defendant.

TYLER, J. It appears by the agreed statement of facts that the testator, J. W. Turner, had two children, Charles W. and Mrs. Lyman, and that when he made his will and codicil the son was living and the daughter had deceased.

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Charles died October 16, 1887, leaving two sons, Henry W. and Roy W. They and Arthur Lyman, son of the testator's daughter, were all living November 26, 1896, and are still living.

The will was made September 30, 1878, and the codicil January 19, 1882. The testator died October 26, 1886. The second paragraph of the will is:

"I give, devise and bequeath all interest and income on all of my property, personal and real estate, not herein before disposed of, to Charles W. Turner and Arthur Lyman, son of Seymour Lyman, as follows: I give, devise and bequeath one-half of said interest and income to said Charles W. Turner during his natural life, and in case of his death I give, devise and bequeath said C. W.'s interest and income to Henry W. Turner and Roy W. Turner, said C. W. Turner's sons, each one-half, and to be paid them for ten years, then principal to become theirs. The other half of said interest and income from all my property not herein before disposed of, I give, devise and bequeath to Arthur Lyman, son of Seymour Lyman, and to be paid to the said Arthur for ten years, then the principal to become his. In case of his death before the expiration of ten years, then in that event, said Arthur leaving no heir or heirs, I give, bequeath and devise the said principal to the American Board for Foreign Missions."

The codicil is as follows:

"I hereby change the foregoing will so as to give the said C. W. Turner two-thirds of said interest and income and one-third to the said Arthur Lyman."

The testator's intention is clearly expressed in the original will to give one-half of the income of his estate to his son Charles for life and after Charles's death to his sons Henry and Roy for ten years, when one-half of the principal should become theirs.

The intention is equally clear and unequivocal that Arthur Lyman should have the other half of the income for ten

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years after the testator's death, when one-half of the principal should be his if he were then living. He was to have as much of the income and principal as both his cousins.

The sons of Charles are not mentioned in the codicil, but no claim is made that they are not entitled to their father's share of the income upon his decease. This was so held in *Lyman* v. *Turner's Executor*, 62 Vt. 465.

The defendants contend that the gift in the codicil of two-thirds of the income to Charles carries with it a gift to him of two-thirds of the principal, while the plaintiff contends that the codicil does not affect the principal.

It is a settled rule that the intention of the testator must, if possible, be discovered, and when discovered, must govern, because, as was said by Chief Justice *Shaw* in *Quincy, Exr.*, v. *Rogers and others*, 9 Cush. 291, * * * "It is his intention, manifested in his words, which makes his last will and testament." The same learned judge gives some of the modes by which the meaning and intent of the testator may be ascertained; as where there is a codicil, the will and codicil are to be construed with reference to each other, to determine from change of circumstances or otherwise what it is intended to alter, and what to retain and confirm; and that the codicil shall change the will so far only as the intent is manifest, especially where in all other respects the will is in terms ratified and confirmed. The rule is concisely stated in *Barnes* v. *Hanks*, 55 Vt. 317: "A codicil is regarded as a part of the will, and the will and codicil are to be construed as one instrument, and a codicil should be so construed if it can fairly be done, so as to make it harmonize with the purposes declared in the body of the will." I Redf. on Wills, 288; *Thompson* v. *Churchill*, 60 Vt. 376. In I Jarman on Wills (6th ed.) 139, it is said that: "In determining the extent to which a codicil affects the disposition of a will, it is an established rule not to disturb the disposition of the will further than is absolutely necessary to give effect to the codicil."

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Nothing is clearer in the whole instrument than that it was the testator's intention by the codicil to increase Charles's share of the income from one-half to two-thirds during Charles's life; but whether he supposed that changing the fractional parts of the income would change the disposition of the principal in the same ratio, or whether he supposed that the change would leave the principal unaffected, must be determined from the entire instrument. It is argued on one side that the testator's omission to mention the principal in the codicil is controlling evidence that he intended to leave it as provided in the original will, under the rule that a purpose in the codicil to alter the will in one particular carries with it the presumption that the testator did not intend to alter it in any other. On the other side it is argued that there is no disposition of the principal in the original will independent of the income, but that it follows the course of the income, and that the silence of the testator in respect to the principal has no significance.

Either one of two events, which the testator might reasonably have anticipated, would defeat the leading purpose of the codicil under the plaintiff's construction of it: If Arthur should die within ten years after the testator's decease his half of the principal would at once vest in the American Board, and only one-half of the estate would remain from which Charles could derive an income. If Arthur lived ten years after the testator's death he would then be entitled to one-half of the estate, and if Charles continued in life he could thereafter receive only the income of the remaining half. The testator, in the original will, did anticipate and provide for the possibility of Arthur's death within ten years after his own, and may be presumed to have considered that possibility when he made the codicil.

Again, if Charles and Arthur lived ten years after the testator's death and Charles then died, under the plaintiff's construction, Arthur would then take his half of the principal and defeat Charles's sons from having two-thirds

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of the income, or the entire principal would be held in trust for ten years that the income might be divided according to the codicil and according to the decision in the 62d Vt. Under one construction the will and codicil would be in certain events, inconsistent with each other, and a trust, which the testator did not contemplate, would arise of necessity; while under the construction here adopted the two parts of the instrument would always harmonize.

Therefore, in view of the testator's clearly expressed desire to provide more amply for his son, we think the more reasonable construction of the codicil is that he supposed and intended that the principal would follow the income by the codicil as it would have done by the will. This view is strengthened by the fact that the possibility of Arthur's death within the ten years was contemplated by the testator, and yet he made no provision that the estate should be held until the end of the ten years for the payment of the income pursuant to the codicil. This construction is not in conflict but in consonance with the well-settled rule cited by the plaintiff's counsel, that where the devise in the will is clear, it is incumbent upon those who contend it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; that if there is a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought to stand.

The entire will must be construed as if the fractional division provided by the codicil were read into the body of the will in place of the division there made, in which case there could be no reasonable doubt but that Charles Turner's sons would take two-thirds of the principal and Arthur Lyman one-third thereof.

Judgment affirmed.

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FREDERICK WILLETT *vs.* THE VILLAGE OF ST. ALBANS.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and START, JJ.

Municipal Corporation—Liability for Negligence—Exemplary Damages—Exception—Evidence.

An individual is not precluded from recovering of a municipal corporation the damages sustained by him from the negligent construction and maintenance of its sewer, merely because it is not on his premises, nor because the injury does not amount to an actual taking of his property.

A party having excepted to the admission of certain testimony upon assigned, untenable grounds, cannot obtain a reversal by the assignment of new grounds here.

The court do not carefully consider whether certain experts admitted in the court below were competent, the testimony given by them having been withdrawn from the jury.

The plaintiff sought to recover damages sustained by him in consequence of his wife's illness claimed to have been caused by the improper condition of the defendant's sewer. *Held*, that he was not entitled to show the existence of other cases in the neighborhood resulting from the same cause.

A municipal corporation planning and constructing a sewer under its chartered power is not responsible for damages resulting from defects in the plan or in the method of construction.

Exemplary damages cannot be awarded against a municipal corporation unless, in some legal way, it previously authorized or subsequently approved the wrong. Consequently the defendant was not liable in such damages for the mere neglect of its trustees to act.

CASE for the negligence of the defendant in the construction and maintenance of its sewer. Plea, the general issue. Trial by jury at the September Term, 1895, Franklin County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The defendant's charter empowered the trustees to make and maintain sewers as the public health and convenience might require, and for that purpose to take the land of individuals under proceedings similar to those provided by statute in case of the taking of land for highways.

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The substance of Dr. Belden's testimony was that he had had several patients within the three years last past, living within one hundred feet of the place complained of, and had one at the time of testifying, whose sickness he attributed to malarial influences contracted from the sewer.

Dee & George for the plaintiff.

Hogan & Royce for the defendant.

Ross, C. J. (1) This action is to recover for damages sustained by the negligence of the defendant in the construction and maintenance of its sewer. On the trial the defendant took several exceptions which it now insists upon, based upon the ground that the plaintiff was not entitled to recover because none of the sewer and none of the sewage complained of came upon the plaintiff's premises. The defendant's charter in regard to constructing and maintaining sewers, in legal effect, is the same as the charter of the village of Rutland which was before this court in *Winn* v. *Rutland*, 52 Vt. 481, in which it was held that the defendant was liable for negligence in constructing and maintaining its sewers to the damage of the plaintiff. In that case the defect, complained of, was on the plaintiff's premises, and the court say the use which the defendant put it to amounted to a *taking* of the plaintiff's land within the perview of the constitutional requirement that compensation shall be made.

The defendant relies upon this decision to support his contention that the plaintiff is not entitled to recover, because neither the sewer, nor any of the sewage came upon the plaintiff's premises, except in the condition of noxious and unhealthy vapors. The other cases cited by him, in support of this point, relate to taking of land for streets, highways and railways. In *Winn* v. *Rutland*, it is not decided that the plaintiff would have been remediless, if the defective sewer had not been on his premises, if it caused him damage. The maxim "*Sic utere tuo ut alienum non laedas*"

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applies in such cases. No person or corporation can so use its own property, or rights as to injure the property or rights of another. If it creates a nuisance on its own property, or in the exercise of its rights, upon common or public property, it becomes liable to adjoining proprietors who suffer special damage. *Gifford* v. *Hulett,* 62 Vt. 342; *Abbott* v. *Mills,* 3 Vt. 521; *Camp* v. *Barre,* 66 Vt. 563; *Sargent* v. *George,* 56 Vt. 627; *Curtis* v. *Winslow,* 38 Vt. 690; *Wesson* v. *Washburn Iron Company,* 13 Allen 95. The opinion in the last case, fully and clearly distinguishes between two kinds of nuisances called public, and holds that a party specially damaged by the maintenance of either may recover against the party guilty of maintaining it upon his own premises. These exceptions are not sustained.

(2) The plaintiff filed several specifications of his claims for damages. The first is for loss and damage on account of decrease in the value of plaintiff's property, and incapacity to sell the same, caused by the defendant's defective sewer. Considerable testimony was received in reference to this item, but at the close of the testimony, the plaintiff withdrew this claim, and the court told the jury not to consider the evidence relating to it. The defendant seasonably objected and excepted to all testimony tending to show damage to the plaintiff under each and every item of his specifications, without showing damage to his land, or a taking thereof. The plaintiff concedes that no recovery could be had under this item. The defendant contends that inasmuch as the evidence was received against its exception, the court, under our decisions, could not cure the error in receiving it by instructing the jury to disregard it. We do not decide whether this would have been true if its exception to this item had been placed upon the ground now claimed, that no recovery could be had under it. The defendant's exception to this testimony was placed upon a specified ground, and not the one now urged against it. The trial

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court's attention was not called to the objection now urged, and it made no decision in regard to it, in admitting the testimony. Its present objection to this testimony cannot avail the defendant. The specified ground of objection, made to its introduction, was not tenable, as shown under the first point considered. It was not injured by the plaintiff's and court's withdrawal of this item from the consideration of the jury. The defendant also took several special exceptions to this class of testimony in regard to whether some of the witnesses were qualified to give an opinion, and in the manner in which they were allowed to give their opinion, or estimation of the amount of damage occasioned to the plaintiff's property by the defendant's negligent maintenance of its sewer. We have not considered these special objections with much care, as the testimony was withdrawn from the consideration of the jury. The defendant concedes that the court was to determine whether the witnesses had sufficient knowledge of the subject matter under consideration, to give an opinion in regard to the nature of the plaintiff's property, and in regard to the damage done thereto by the defendant's negligence, complained of. The trial court observes the witness, and can determine better than can be shown by what the witness says, and is placed on record, in regard to the competency of the witness in this respect. Much more latitude is allowed, under our practice and decisions, to the witness in giving his opinion in regard to the value of, and damage done to, property, than is allowed in many of the other states. We have observed no substantial error in these respects.

(3) The testimony of Dr. H. G. Belden received against the defendant's exception which related to patients which he had attended living in other houses, whose sickness he attributed to the escape of sewer gas from the locality complained of by the plaintiff, was improperly received. Every such case of sickness, although occurring in houses

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near the house of the plaintiff, was not relevant to the sickness of the plaintiff's wife, either in time, or circumstances. It brought into the case a new issue, not embraced in the issues on trial. The defendant was not called upon, by the issues on trial, to inquire into and to be prepared to show the cause of such sicknesses. Besides such outside issues tend to confuse the jury, prolong the trial, surprise and prejudice the defendant.

(4) If the plaintiff had been allowed to recover for injury to the health of his wife, other than for what he expended in nursing and doctoring her, and in loss of her services and society it would have been error. We do not find that he was allowed so to recover. The charge confines his recovery on this item to his expenses for medicines and tonics for the wife if it was shown her sickness was caused by the defendant's negligence. This was unobjectionable.

(5) The defendant requested the court to charge the jury: "That if the jury are satisfied, by a fair balance of testimony that the damage suffered by the plaintiff, if any there was, was due in whole or in part to the defective plan or method of construction of the so-called Mason sewer, laid in the bed of the brook, then for such damage so resulting the plaintiff is not entitled to recover." The doctrine of this request is recognized in *Winn* v. *Rutland*, 52 Vt. 481. It is there said:

"In acting under the chartered power, the village authorities must necessarily deliberate and adjudge upon a system or plan of the work,—when to perform it and where to locate it. So far no liability to private action is incurred for errors in judgment, or want of forecast. * * * * * Having devised a plan, it may be carried into execution with due care, without risk of private action. The charter makes the construction of the work lawful, and if the work be done in a proper manner, the chartered power is a complete bar to a claim of consequential damages to persons or property." Mr. Dillon recognizes the same

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doctrine in Vol. 2, § 1046, of his work on Municipal Corporations. He says, "the corporation is not liable to a civil action for wholly failing to provide drainage or sewerage, nor probably for any defect or want of efficiency in the plan of sewerage or drainage adopted; nor, according to the prevailing view, for the insufficient size or want of capacity of gutters or sewers for the purpose intended." This he says is because in these respects the municipality acts judicially or *quasi* judicially. To the same effect are, *Child* v. *Boston*, 4 Allen 41; *Johnston* v. *Dist. Columbia*, 118 U. S. 19; *Mills* v. *Brooklyn*, 32 N. Y. 489.

The defendant's evidence tended to show that the condition of the sewer and sewage complained of, was not due to the negligence of the defendant, but to the defectiveness of the original design, and plan of construction of the receiving sewer. Hence there was evidence to which this request was applicable. The court did not comply with it, nor make any charge upon the subject. For this refusal the defendant excepted. On the authorities cited this refusal was error.

(6) The defendant also excepted to the charge of the court on the subject of exemplary damages. The court told the jury that if they found that the plaintiff was entitled to recover some actual damage, then, although the plaintiff could not claim it as a matter of right, they might in their discretion award him exemplary damages if they found the defendant's negligence, causing the actual damage, was so gross as to amount to a wanton and wilful disregard of the rights of the plaintiff. To the allowance of this class of damages in this case the defendant excepted. He does not complain of the language of the charge, if this class of damages were allowable under the circumstances of the case. The negligence complained of, and which the plaintiff's testimony tended to establish, was that the trustees of the defendant did not cause to be properly connected the sewers running east and west with the sewer in Stevens brook running

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north, and in allowing the latter to become broken in and filled up so that sewage accumulated in the brook near the dwelling occupied by the plaintiff, and that the trustees did not, although notified by the plaintiff several times, remedy these defects, but allowed them to remain for a considerable length of time, and that, in the mean time, the accumulated sewage became, and was, offensive, disagreeable, noxious, and unhealthful; that the gas escaping therefrom entered the plaintiff's dwelling and caused him damage in several particulars. Exemplary, or punitive, damages have been allowed in this State, in actions of tort, under the conditions named in the charge, from an early period, against personal defendants. No case has been brought to our attention, and we know of none, in which in this State such damages have been allowed against a corporation. Hence we are not controlled by previous decisions on this subject. It is very generally held that exemplary damages may be allowed against corporations, and possibly against strictly municipal corporations. In examining this subject quite a large number of cases have been considered. Most of them have been against railroad corporations. I have not seen one against a strictly municipal corporation like the defendant. The limitations on which this class of damages are recoverable against railroad corporations are variously stated by the different courts. One searches in vain for any uniform rule governing the allowance of this class of damages against railroad corporations. In most of the cases against railroad corporations the plaintiff has been a passenger, or employe to whom it sustained a contract relation, a very different relation from that which a municipal corporation bears to its citizens. The most satisfactory and logical opinion on this question against a railroad corporation, which has fallen under our notice, is that of *Judge Gray* in *Lake Shore & Mich. S. R. R.* v. *Prentice*, 147 U. S. 101. In it a large number of decisions, both English and American, are reviewed. It is there held

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that, inasmuch as this class of damages are not allowed as compensation for damages sustained by the person wronged, and only as a punishment against the offender because of his malicious, wanton, or reckless conduct, when the offender is the agent or servant of another, the principal can be made liable for this class of damages only when he has either directed, participated in, or subsequently approved, the misconduct of his servant or agent; nor does it make any difference that the servant, or agent, was acting within the scope of his employment, or agency, unless the scope of the employment or agency included the exercise of malice, wantonness, or recklessness, or the commission of the offense for which such damages are allowed. We think this is the logical and reasonable deduction and conclusion to be drawn from the conditions on which this class of damages are allowed. On this decision, a party, asking for the rendition of such damages, must, either bring his suit against the servant or agent guilty of the wrongful conduct, or, if he brings his action against the principal, establish that the principal was also guilty of the wrong, by directing, participating in or subsequently approving of the wrong. On this basis, the exemplary or punitive damages are made to fall upon the offender. They are a punishment to him, and a warning to others not to offend, and secure the only purpose for awarding them. They are never suffered to fall on a party innocent of the offense, for which they are the punishment. With this limitation this class of damages have a reasonable basis to rest upon. Without it, they are made to fall upon the innocent, in many cases, while the guilty party bears none of the punishment. With this limitation, such damages cannot be allowed against a municipal corporation unless such corporation, in some legal way, either authorizes, or subsequently approves of, the wrongful act or neglect. The trustees of such a corporation can only act by a majority vote. They are the business managers of the corporation.

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But after once elected, the voters and taxpayers on whom such damages must fall if awarded, cannot, during their term of office, discharge them, and usually cannot control their action, within the scope of their office. In the case at bar, the most which the plaintiff's testimony tended to show was that the trustees of the defendant neglected to act in the premises. If the action of the trustees can ever render the defendant, municipal corporation, liable for this class of damages, their neglect or refusal to act in this case had no such tendency. This exception is sustained.

Judgment reversed and cause remanded for a new trial.

N. McMullin *vs.* J. W. Erwin.

January Term, 1897.

Present: Taft, Rowell, Tyler, Munson and Start, JJ.

False Imprisonment—Damages—Evidence—Argument—Liability of Attorney for Act of Officer.

There is no practice for dismissing a notice filed with the general issue.

In an action for false imprisonment, based upon the improper arrest of the plaintiff on civil process, it is proper to show, as bearing upon the question of exemplary damages, that there was a legal foundation for the original suit, and also to show the proceedings therein.

A remark in argument, unsupported by evidence, furnishes no ground for exception in favor of a party whose own remark, likewise unsupported, naturally provoked it.

An attorney who entrusts to an officer, for service, a lawful *capias* writ, is not liable for an arrest made by the officer under the writ after it has been altered without the attorney's direction or advice.

Neither does he make himself liable by proceeding with the suit, with knowledge of the facts, after the return of the writ, the arrest not having been made in his interest, nor for his benefit.

Trespass for false imprisonment. Plea, the general issue with notice. Trial by jury at the September Term, 1896,

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Orleans County, *Ross*, C. J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

The plaintiff moved to dismiss the notice because it contained no matter of defense not provable under the general issue, and did contain immaterial and prejudicial statements of fact. The motion was overruled and the plaintiff excepted.

The plaintiff offered to show that at the justice trial in the original action his counsel notified the defendant that the arrest was illegal and that if he proceeded with the suit he would be sued for false imprisonment; and that the defendant then replied that the suit had been well brought and was all right. This evidence was excluded and the plaintiff excepted. The plaintiff also excepted to the admission of the original note and the record of the proceedings before the justice in the suit thereon.

In argument to the jury the plaintiff's counsel stated that the defendant knew that the affidavit, writ and arrest were illegal and that no reputable lawyer would do as he had done. Of this there was no evidence. In reply to this statement, counsel for the defendant said that it was the practice among the lawyers to make affidavits for the arrest of parties living in Canada, to lodge them with the justices and take out writs, placing them in the hands of officers to be served when the parties came across the line; that he had done it and he had no doubt plaintiff's counsel had done the same. Of this there was no evidence. The court held that the reply, being called out by the statement of plaintiff's counsel, unsupported by testimony, was not improper. The plaintiff excepted.

A. D. Bates for the plaintiff.

The court should have admitted the offered evidence as to what occurred before the justice, because it showed that the defendant adopted, approved and availed himself of the benefit of the illegal arrest, which would make him liable. *Mack* v. *Kelsey*, 61 Vt. 399.

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The exception to the remark in argument by defendant's counsel should be sustained. *Magoon* v. *B. & M. R. R.* 67 Vt. 177. There was no evidence to support this statement, while, it is submitted, notwithstanding the statement of the presiding judge, that there was evidence in support of the statement by plaintiff's counsel in reply to which it was made.

A verdict should have been directed for the plaintiff, for the defendant was responsible for the acts of the officer, having put it in his power to make the arrest. Moreover it was a continuing trespass,—an imprisonment lasting until the case ended. V. S. 1714; *Worthen* v. *Prescott*, 60 Vt. 68.

The case shows that the arrest was for the benefit of the defendant to the extent of his interest in fees for which he would have a lien upon the money when collected. Moreover he had recognized for the costs. *Gold* v. *Bissell*, 1 Wend. 210; *Fenelon* v. *Butts*, 53 Wis. 344; *Burnap* v. *Marsh*, 13 Ill. 538; *Warfield* v. *Campbell*, 35 Ala. 349.

John Young and *C. A. Prouty* for the defendant.

It was proper to show that the suit was brought upon a legal cause of action as bearing upon the question of exemplary damages. *Meagher* v. *Driscoll*, 99 Mass. 281; *Sutherland* v. *Ingalls*, 63 Mich. 620: 6 Am. St. 332; *Richardson* v. *Emerson*, 3 Wis. 319: 62 Am. Dec. 694. The same cases show the propriety of admitting the record of the proceedings in that action.

The defendant did not, by conducting the suit as attorney with knowledge of the change in the writ, make himself a trespasser. The sheriff was not the servant of the attorney nor of the plaintiff in that action, but a public officer. *Dunbar* v. *Boston*, 112 Mass. 75; *Richardson* v. *Emerson*, *supra*. There was no evidence of an unlawful combination between the attorney and officer, and none was to be presumed. II Green. Ev. § 641; *Hubbard* v. *Hunt*, 41 Vt. 376; *Hyde* v. *Cooper*, 26 Vt. 552; *Adams* v. *Freeman*, 9 Johns. 117; *Sutherland* v. *Ingalls*, *supra; Vail* v. *Lewis*, 4 Johns. 450, note; *Kirkwood* v. *Miller*, 73 Am. Dec. 142, note.

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TYLER J. Action for false imprisonment, plea, general issue and notice. The plaintiff in the court below waived the counts in case and claimed to recover only in trespass. The defendant is an attorney and as such on March 14, 1892, having received a note against the plaintiff for collection, made a *capias* writ against him, and on March 15th made his affidavit that the plaintiff was about to abscond or remove from this state and filed it with a justice of the peace. The justice then signed and issued the writ which was made returnable May 2, 1892, and was sent by the defendant by mail to a deputy sheriff to serve and return. The plaintiff was not in this state March 14th nor 15th, and no service of the writ having been made in its life, the date was afterwards changed to May 14th, and the return day to June 16th.

The plaintiff's evidence tended to show that he was arrested on the writ with the dates thus changed, on May 25th, and gave bail for his appearance. The officer testified that the dates were changed by the defendant but he was unable to say whether before or after the arrest.

The defendant's evidence tended to show that he did not change the dates nor direct them to be changed; that he gave no direction to the officer to serve the writ after the alterations had been made; that he had no knowledge of any alterations until after the service and return, and that he thought that the officer returned the writ to him either on the day or the day after the service and then told him that his, the officer's, daughter had changed the dates.

The question as to the defendant's liability seems to have depended mainly upon whether he changed or directed the dates to be changed after the writ was issued, and if not, whether he ordered the arrest after the changes were made. These were questions of fact and were decided by the jury. Some exceptions were taken to the rulings and the charge which we will consider.

There is no practice by which the notice could have been

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dismissed. The question was as to the sufficiency of the matters therein alleged as a defence. To the argument that the statements in the notice were calculated to mislead the jury it is sufficient to say that it does not appear that the jury read it or heard it read. There is no error in the refusal of the court to dismiss the noticc.

The alleged admission of the defendant at the trial in the justice's court was immaterial to the plaintiff. At most it tended to show that the defendant then thought the suit had been properly brought and that he acted in good faith in the matter.

It was proper to admit the original note in evidence under the general issue upon the question of exemplary damages. It showed a cause of action upon which the suit was founded.

It was clearly admissible to show what the proceedings were before the justice, and no objection seems to have been made that this was shown by the files instead of by the record.

The remark of defendant's counsel to which the plaintiff objected seems to have been made in reply to a statement of plaintiff's counsel, and not as a matter in evidence, and was not a ground of exception.

The exception upon which the plaintiff most relies is to the refusal of the court to hold the defendant liable as matter of law upon his own testimony. It appears that he made a lawful *capias* writ and sent it to an officer to serve and return, and that he had no knowledge of alterations in the writ until after the plaintiff had been arrested and given bail and the writ had been returned to the defendant. There is no evidence of a common design between the defendant and the officer to do an unlawful act. The defendant's purpose was lawful, to collect a debt by legal process. The law is well settled by the authorities cited on the defendant's brief that, as the defendant did not aid, advise nor command the commission of the tort, nor have

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knowledge of it until after it had been committed, he was not liable.

But the plaintiff insists that, as the defendant proceeded with the suit to judgment after he knew of the alteration of the writ he thereby became liable on the ground that he approved of the tort and derived benefit from it. It was held in *Hunter* v. *Burtis & Ellsworth*, 10 Wend. 358, that where an illegal arrest had been made, the attorney who appeared to advocate the cause was not responsible unless he officiously interposed in directing the arrest. See *Kirkwood* v. *Miller*, 73 Am. Dec. 142, notes, where the general rule is stated that an attorney is not liable for a trespass committed by an officer in overstepping the bounds of his process, or acting in a manner which the writ, if legal, would not justify.

The court below certifies that no claim was made during the trial and argument that the arrest was for the benefit of the defendant and that the court's attention was in no way called to it; therefore no question is before us in respect to benefits derived by the defendant. He was acting as attorney and not for his own benefit, and the deputy sheriff was not his servant and agent, but a public officer. We find no error in the trial.

Judgment affirmed.

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WILLIAM P. OAKMAN *vs.* CHARLES H. WALKER, et al.

January Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Conditional Deed—Grantee's Equity—Bill to Redeem—Res Gestae—Declaration against Interest—Statute of Limitations.

James, Sr., conveyed premises to James, Jr., upon condition that he should be allowed to occupy during life and be paid a note which the latter owed him. The grantor occupied during life but the grantee never paid any part of the note although it was overdue. Under these circumstances it was considered doubtful, at least, whether the grantee had any equity in the premises.

The note not having been paid at maturity James, Sr., conveyed the premises by warranty deed upon full consideration to Margaret, and the deed was recorded. Thereafter James, Jr., resided on the premises with Margaret until her death, being partly supported by her and making no claim against her possession and control. This bill having been brought by a grantee of James, Jr., it was *held*, that he might redeem by paying the note less the rents and profits during the occupancy of Margaret and her representatives, the defendants consenting to account, although it was considered doubtful whether an accounting could have been required.

In this State the conveyance of the mortgaged premises by the mortgagee, by warranty deed, after condition broken, carries with it the fee of the premises supported by the mortgage debt, which the mortgagor must pay to the grantee in order to redeem.

The declaration of James, Jr., before his conveyance to the orator, that he had never paid any part of the note, was admissible against the latter.

The declaration of James, Sr., at the time of his conveyance to his daughter, Margaret, that "it did not half pay his debt to her," was admissible as characterizing the transaction and showing that the deed was being made for full consideration.

The orator, asking the aid of a court of equity to be allowed to redeem, cannot insist that the mortgage debt is outlawed.

BILL IN CHANCERY. Heard on the pleadings, master's report and exceptions thereto, at the September Term, 1896, Rutland County. *Rowell*, Chancellor, decreed that the orator might redeem by paying the debt in stated installments. The orator appealed.

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The note referred to in the opinion was payable in annual installments of one hundred dollars beginning with July 9, 1871.

The bill was brought by William P. Oakman, the grantee of James Oakman, Jr., against the heirs of Margaret Alford and the executor of her will. Said executor answered and filed a cross bill praying a foreclosure of the orator's equity. The findings of the master appear in the opinion.

Butler & Moloney for the orator.

This is a bill to redeem from the conditions of a deed in which a life estate was reserved. There was a condition for the payment of money. The orator offers to pay whatever may be found due on an accounting.

The orator insists that there is nothing due, by reason of the presumption of payment arising from lapse of time in analogy to the statute of limitations.

The deed from James Oakman, Sr., to Margaret Alford did not operate as an assignment of the mortgage debt. *Welsh* v. *Phillips*, 54 Ala. 309: 25 Am. St. 682; *Duval's Heirs* v. *McLoskey*, 1 Ala. 737.

James, Sr., was not a mortgagee in possession, but only a life tenant of James, Jr.

The declaration of James, Sr., at the time of the execution of his deed to Margaret, was a declaration in his own favor and inadmissible.

But if James, Sr., was a mortgagee in possession he and his assigns must account for the rents and profits. They must also account for repairs. *Flannery* v. *Flannery*, 58 Vt. 578; Wood, Lim. § 227; *White* v. *Maynard*, 54 Vt. 575; *Still* v. *Buzzell*, 60 Vt. 478.

Fred S. Platt and *Henry O. Clark* for the defendants.

The conveyance from James Oakman, Sr., to Margaret Alford operated as an assignment of all his rights under the conditional deed. *Collamer* v. *Langdon*, 29 Vt. 32; *Welsh* v. *Phillipps*, 54 Ala. 309; *Ruggles* v. *Barton*, 13 Gray 506; II Washburn, Real Prop. 121.

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Ross, C. J. By the terms of the warranty deed from James Oakman, Sr., to James Oakman, Jr., dated July 9, 1870, the property was not to vest in the grantee until he performed the two conditions therein named: allowed the grantor to retain possession of the premises during the grantor's natural life; and paid his note then given to the grantor for nine hundred dollars. Under this deed, standing alone, it was incumbent on the grantee and those claiming under him to show a performance of these conditions, in order to have the title vest in the grantee. Under it the grantee was never in possession and control of the premises. So far as found by the master, the grantee never paid anything on the note, nor did he at the time of making of the deed, or before, advance to the grantor anything on the faith of the deed. What the master has found in regard to the grantee having paid one hundred and twenty-five dollars for the grantor on the Beman mortgage, is immaterial, inasmuch as he has not found that it was treated as a part of the consideration for, nor, in any way connected with the giving of the deed. Hence the deed of July 9, 1870, is to be considered in the light of a deed under which the title was to vest in the grantee upon his performance of these two conditions. Immediately following the conditions is the provision, "When these conditions are fully complied with then this deed is to be in full force and virtue in law, and otherwise null and void." Under this provision, to raise an equity, it would seem that the grantee should, in part, at least, have performed the conditions. The condition in regard to the life estate was a reservation in favor of the grantor, and required no action by the grantee. But the condition in regard to the payment of his note for nine hundred dollars required action by him to raise an equity in his favor. No payment of any kind is found to have been made by him on this note. April 6, 1882, after the note for nine hundred dollars was wholly overdue, and unpaid, James Oakman, Sr., conveyed the

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premises to Margaret Alford by a deed of warranty, on full consideration as found by the master. The record of this deed was constructive notice of it to James Oakman, Jr. He also resided on the premises with Margaret Alford, and was partly supported by her, the last three years of her life. He made no claim to the premises while Margaret Alford was in possession and control of them under her deed from April, 1882, to the time of her death in October, 1893. The declaration made by James Oakman, Sr., while making this deed to Margaret, that it did not pay half his debt to her, was admissible, because it characterized the transaction, and showed that the deed was being made for full consideration. It showed that, notwithstanding their relations were those of parent and child, there also existed between them the relation of debtor and creditor. Otherwise the father could not have been in debt to her. On these facts, against Margaret Alford and the defendants who claim under her, it is difficult and apparently impossible to raise an equity in the premises in favor of James Oakman, Jr., or the orator who claims under him. The court of chancery treated the conveyance of July 9, 1870, as creating an equitable interest in the premises in favor of James Oakman, Jr. On this basis, wholly, the case has been presented to this court. The orator's bill is drawn to enforce such equitable right. He claims that James Oakman, Jr., fully performed, and offers to pay whatever may be found due under the conditions of the deed if they were not fully performed by him. Considering the case on this basis, it is incumbent on the orator to establish that James Oakman, Jr., in whole or in part fulfilled the conditions imposed upon him by the deed of July 9, 1870. He did not interfere with the life estate reserved to James Oakman, Sr. If the orator claims that James Oakman, Jr., made any payments on his note for nine hundred dollars, it is for him to establish such payments. Claiming through James Oakman, Jr., against the right of the defendants, who claim under James Oakman, Sr., the

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former's declaration to the attorney of the latter, in 1877 or 1878, that he had paid nothing on his note of nine hundred dollars was admissible. It was a declaration against James Oakman, Jr.'s interest and therefore against the interest of the orator. In connection with this declaration, the continuous poverty of James Oakman, Jr., and the fact that James Oakman, Sr., conveyed the premises by deed of warranty to Margaret Alford, who was then in possession of the premises, in April, 1882, and that she continued in possession until her decease in 1893, and James Oakman, Jr., made no claim to the premises, the master has found that James Oakman, Jr., never paid anything on his note for nine hundred dollars. It was for the orator to establish a payment. His right, derived under James Oakman, Jr., depended, in a measure, upon such payment being established. But if, as the master seems to have regarded it, the burden was on the defendants to negative such payment, all these facts and circumstances could properly be shown, and considered by him. Without considering or deciding whether the conveyance of April 6, 1882, standing alone, could have been shown and considered by the master on this question, it was clearly admissible in connection with the facts that Margaret thereafter continued in possession and control of the premises to the knowledge of James Oakman, Jr., and that he made no claim to the premises until after her decease in 1893. This brings us to the main contention on this point. Treating the deed of July 9, 1870, as creating an equitable mortgage of the premises in favor of James Oakman, Jr., and that he had not paid the mortgage debt on April 6, 1882, when the mortgagee, James Oakman, Sr., conveyed the premises to Margaret Alford by a deed containing the usual covenants of warranty, did this deed,—nothing being shown to the contrary,—convey the mortgage debt due from James Oakman, Jr., to the grantor? The decisions on this question are apparently in conflict. But the conflict is only apparent.

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In many of the states, especially the code states, the fee of the premises mortgaged never becomes vested in the mortgagee. The mortgage is treated as creating a lien, only, in his favor to secure the payment of the mortgage debt. His only rights created by the mortgage are to have no waste committed by the mortgagor, and, if payment of the mortgage debt is not made when it is due, to have the real estate mortgaged, sold, and the sum realized applied, or so much of it as is necessary, to the extinguishment of the mortgage debt. The title to the premises does not vest in the mortgagee, upon the passing of the law day, nor does it vest absolutely in him by foreclosure of the mortgage. The mortgagee has no right to the premises created by the mortgage except such as are collateral and incidental to the debt secured thereby. The mortgage is considered as a chattel or personal property interest. The only end, or result of such mortgage, being security for the payment of the debt, it follows that the mortgagee by a conveyance alone of the mortgaged premises, does not impliedly, nor necessarily, convey any right to any portion of the mortgage debt, and that for such conveyance to create any interest in the grantee other than that of trustee for the mortgagee, a conveyance of the mortgage debt, or some portion of it, must be shown. Hence, when under the law of the jurisdiction, the mortgagee has only these rights, his conveyance of the premises mortgaged, does not impliedly convey the mortgage debt. But in this, and several of the other states, upon the passing of the law day without performance, or payment, by the mortgagor, the fee of the mortgaged premises becomes vested in the mortgagee, and there remains in the mortgagor only the equitable right of redemption which is fully extinguished by a foreclosure. After the law day has passed, the mortgagor, if he remains in possession, is treated as a tenant at will. After the law day has passed, a conveyance of the mortgage premises by a quit claim deed by the mortgagee, conveys what rights he

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has under the mortgage, supported by whatever of the mortgage debt is then due and unpaid. If made to the mortgagor it operates as a discharge of the mortgage; if to a third person it may be, and impliedly is—if nothing more is shown—a conveyance of all his rights supported by the mortgage debt; or, where only a portion of the mortgaged premises is conveyed, it may have been intended only to bar him from asserting his debt against the portion conveyed. When the mortgagee conveys, after the law day has passed, the mortgaged premises by a deed containing the usual covenants of warranty, these covenants imply a conveyance of all his rights, supported and fed by whatever rights he then holds, or may thereafter acquire. Hence, nothing being shown to the contrary, and it being shown, that if, the deed of July 9, 1870, be considered an equitable mortgage, the debt therein described and included in the note of the grantee for nine hundred dollars, being overdue and still existing in favor of James Oakman, Sr., his conveyance of April 6, 1882, operated impliedly to convey to Margaret Alford the fee of the premises, supported by the mortgage debt then owned by him as against the rights of James Oakman, Jr., to redeem. Such is, in substance, the holding of this court in *Collamer* v. *Landgon*, 29 Vt. 32. The same is also held in *Welsh* v. *Phillips*, 54 Ala. 309: 25 Am. R. 679; *Hunt* v. *Hunt*, 14 Pick. 374: 25 Am. Dec. 400 and note; *Murdock* v. *Chapman*, 9 Gray 158; *Ruggles* v. *Barton*, 13 Gray 507; *Kilborn* v. *Robbins*, 8 Allen 472; *Lawrence* v. *Stratton*, 6 Cush. 163. As embracing the two apparently conflicting classes of decisions, see *Wilson* v. *Troup*, 14 Am. Dec. 458 and note; 3 Pom. Eq. § 1209-1213 and notes; Wash. R. Prop., chap. XVI, §§ 8-18.

The facts surrounding this case impress upon it a peculiar *character*, so peculiar that it is doubtful,—if the deed of July 9, 1870, created an equitable interest in the premises in James Oakman, Jr.,—whether the defendants are to account

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for the rents and profits of the premises for the time Margaret Alford and they have been in possession. We have no occasion to determine the question. The defendants' solicitor says that they are willing to account for such rents and profits in reduction of the amount due on James Oakman, Jr.'s note for nine hundred dollars.

The solicitor for the orator has made a point in regard to the statute of limitations having run on this debt, or some part of it. It might be so, if this were an action at law. But, in equity against an equitable mortgage, a party cannot claim the right to redeem and invoke the statute of limitations at the same time. They are inconsistent positions. The right to redeem against a mortgagee in possession exists for fifteen years after possession taken. If the mortgagor demands this equitable right, he must also do equity, and pay the debt due under the mortgage, after application of the rents and profits. By such application equity treats the mortgage debt as still subsisting. *In re Chickering*, 56 Vt. 82.

The orator contends that the defendants should be charged with depreciation in the value of the property through a failure to keep it in proper repair. His grantor, James Oakman, Jr., by the deed of July 9, 1870, stipulated to keep the premises in repair. The only neglect, hinted at, in the facts reported, was while he was under this duty. No such neglect is shown since Margaret Alford came into possession under the deed of April 6, 1882. There is no basis for this contention.

Decree reversed pro forma and cause remanded to have an account of the rents and profits received by Margaret Alford and the defendants applied in reduction of the sum due on the nine hundred dollar note, and a proper decree entered that the orator pay the balance found due on the note by the time fixed by the court, or be foreclosed of his right to redeem.

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GRACE I. PARKER *vs.* TAYLOR O. PARKER.

January Term, 1897.

Present: TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Action at Law upon Termination of Trust.

The defendant received a fund to keep invested and pay with its accumulations to the plaintiff and her sister in stated shares upon their arrival at majority. *Held*, that the plaintiff, becoming of age, might maintain an action at law for her share, diminished by the expense of administering the trust.

Lynde v. *Davenport*, 57 Vt. 597, followed; *Congdon* v. *Cahoon*, 48 Vt. 49, distinguished.

ASSUMPSIT in the common counts. Plea, the general issue. Trial by jury at the March Term, 1896, Washington County, *Ross*, C. J., presiding. Verdict directed for the defendant. The plaintiff excepted.

J. P. Lamson for the plaintiff.

The trust has terminated and the legal title is in the plaintiff, so that a suit at law may be maintained. Any advancements or expenses chargeable to the fund may be offset.

The plaintiff is not seeking to establish a trust, for that is conceded, nor to settle a trust, for that was settled when the defendant took the money and agreed to pay it to the plaintiff when she became of age. *Lynde* v. *Davenport*, 57 Vt. 597; *Harris* v. *Harris*, 44 Vt. 320; *Underhill* v. *Morgan*, 33 Conn. 105.

John W. Gordon for the defendant.

The notes were given in gross to the defendant for two beneficiaries, only one of whom is a party to this suit. To allow one to recover her full share might be unjust to the other. All parties to the trust should be in court and this can be done only in equity. *Congdon* v. *Cahoon*, 48 Vt. 49; I Pom. Eq. Jur., §§ 150 and 151.

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The trustee's expenses are a lien upon the fund and cannot be determined in this action. *Rensselaer & Saratoga R. R. Co.* v. *Miller & Knapp*, 47 Vt. 146, 152.

A court of law cannot determine the accumulations for which the trustee should be held liable. The legal rate of interest may not be the criterion.

TAFT, J. The only question in this case is whether the plaintiff can maintain an action at law to recover the claim in controversy or whether her only remedy is in equity.

The defendant received eleven hundred dollars in certain mortgage notes that were subsequently paid him. He was to take care of the fund, keep it on interest, and when the plaintiff and her sister, respectively, became of age, he was to pay five hundred dollars, with its accumulations, to the plaintiff, and six hundred dollars, with its accumulations, to the sister. The defendant insists that this transaction created such a trust that it can be settled only in a court of equity, relying upon the case of *Congdon* v. *Cahoon*, 48 Vt. 49. That was the case of trust created by a deed of real estate and the gift of certain mortgage notes. The trustees were to take charge of the property, collect the income thereof and expend it, and to some extent, expend the principal, in the support of the wife of the grantor in the deed, and four of his children. The beneficiaries were not entitled to equal shares of the income, but it was to be used in the discretion of the trustees in the support of them all. The plaintiff was one of the four children, and upon arriving at full age, when she was entitled to a certain share of the property, brought an action at law to recover it. The trust was still an active one; the trustees were to continue as such until the youngest child arrived at its majority, and there had been no settlement of the trustees' accounts. The plaintiff's share of the fund could not be determined except by a settlement of the trustees' accounts. It was necessary that all of the parties in interest should be parties to any settlement made, and it was very properly

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ruled that the plaintiff could not recover at law any share that might, upon the settlement of the account, belong to her. The legal title of the property was in the trustees, and the only remedy any of the parties in interest had was in a court of equity that had complete and exclusive jurisdiction of the subject matter.

The case before us differs in essential particulars from that case. The defendant received the money, was under a duty to keep it bearing interest, and to pay the fund to the plaintiff upon her arrival at the age of majority. He was not authorized to expend any money, whatever, for the support of the plaintiff, and could have no claims in respect to it unless it was for his services in the care of it. The trust ended when the plaintiff became of age. She was then entitled to the money, and the legal title of the property became vested in her at that time. This being so, she has a right to maintain an action at law to recover it. The reason why a *cestui que* trust cannot maintain an action at law against the trustee is because the legal title of the property is in the latter and not in the beneficiary.

The defendant should account to the plaintiff; there can be no difficulty in determining the amount of the trustee's expenses for administering the trust, and any valid claim of that nature can be deducted from the amount of the funds in his hands before any judgment is rendered against him.

The plaintiff is entitled to the five hundred dollars and the accumulations less any valid expenses of the defendant in respect to the fund, and any payments heretofore made.

This case is ruled by that of *Lynde* v. *Davenport*, 57 Vt. 597; and see the cases therein cited. It has been held that in case of an active trust, the trustee is liable to an action at law in behalf of the beneficiary if any portion of the trust funds are separated from the main fund and the trustee promises to pay the beneficiary the amount. Under this principle, there was testimony which required a submission of the case to the jury, as there was evidence tending to

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show that the defendant, when the money was demanded of him, replied that if the plaintiff would go with him, he would pay her a part of it, and secure her for the balance. She did go with him, as he proposed, stayed over night with him, but when asked for it in the morning, he said he was not ready to pay. This if true would entitle her to a recovery; but it is unnecessary to place the case upon this ground, as we think the equitable estate had ended, and the action at law maintainable.

Judgment reversed and cause remanded.

SIDNEY H. SHERMAN *vs.* ESTEY ORGAN CO.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Sufficiency of Affidavit to Chattel Mortgage.

This court will not reverse its own decision in the same case upon the same facts.

***Sherman* v. *Estey Organ Co.*, 67 Vt. 550, approved.**

An affidavit, "that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof and for no other purpose, and that the same is a just debt, due and owing from the mortgagor to the mortgagee," is not a compliance with the statute of New Hampshire, which requires the affidavit to state, "that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage."

TROVER for wood and lumber. Plea, not guilty. Trial by jury at the September Term, 1896, Windham County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff claimed title to the wood and lumber by virtue of a chattel mortgage and a foreclosure sale to

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himself thereunder, subsequent to which sale the defendant converted the same to its own use, claiming title thereto by virtue of conveyances, from other parties, of the land upon which said wood and lumber grew, and a bill of sale of the same from the plaintiff's mortgagor.

K. Haskins and *Waterman, Martin & Hitt* for the defendant.

Clarke C. Fitts and *L. M. Read* for the plaintiff.

The affidavit was a substantial compliance with the statute. Literal compliance was unnecessary. *Randall* v. *Baker*, 20 N. H. 335; *Comey* v. *Pickering*, 63 N. H. 126; *Gilbert* v. *Vail*, 60 Vt. 261.

The sufficiency of the affidavit was settled by the former decision. *Sherman* v. *Estey Organ Co.*, 67 Vt. 550.

ROSS, C. J. When this case was before this court, as found in 67 Vt. 550, it was held that the chattel mortgage from Waite to the plaintiff,—if it was executed for the purpose and under the circumstances which the plaintiff's testimony tended to establish,—was so far as regards the facts which that testimony tended to establish, valid. The decision of this court upon a point in a case will not be departed from when the case comes again before the court, so long as the facts relevant to the point decided remain unchanged. *Ross* v. *Bank of Burlington*, 1 Aik. 43; *Dana* v. *Nelson*, 1 Aik. 252; *Herrick* v. *Belknap*, 27 Vt. 673; *Stacy* v. *Vt. Cent. R. Co.*, 32 Vt. 551; *Barker* v. *Belknap*, 39 Vt. 168; *Child* v. *Insurance Co.*, 56 Vt. 609; *St. Johnsbury, etc., R. Co.* v. *Hunt*, 59 Vt. 294.

(1) No new facts relevant to whether the true relations of the plaintiff and of Waite to their note given to Herrick, upon which the plaintiff had written, "Surety" after his signature, could be shown by evidence *aliunde* the note, have been brought into the case since the decision. That decision is conclusive upon this point. The trial court properly admitted such evidence.

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(2) Upon the former trial a verdict was ordered for the defendant at the close of the plaintiff's testimony. The exceptions then before the court show that only § 9 of chapter 140 of the laws of New Hampshire was admitted in evidence. This chapter relates to mortgages of personal property, and points out the manner in which they must be executed and recorded to be effectual against attaching creditors and purchasers. Section 9, in substance, provides, that if the mortgage is executed to secure the mortgagee for a liability other than a debt due to him from the mortgagor, the form of the oath given in § 6 of the chapter shall be so varied as truly to describe such liability. On this trial the whole of chapter 140 of the laws of New Hampshire was in evidence. The exceptions then did not include the form of the oath required by § 6 of that chapter. Hence the point whether the oath affixed to the mortgage given by Waite to the plaintiff complied, in substance, with the form of the oath prescribed by § 6 of chapter 140 of the laws of New Hampshire was not raised by those exceptions, nor was it considered by this court in the decision then made. The personal property mortgaged was located in New Hampshire, and the mortgage to be valid must be executed in accordance with the laws of that state. The mortgage from Waite to the plaintiff of the property, in contention, was executed in Windham County, and has upon it the form of oath prescribed by V. S. 2253, reading, "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose, and that the same is a just debt, due and owing from the mortgagor to the mortgagee." The oath prescribed by § 6 of chapter 140 of the laws of New Hampshire, and required to be taken by the parties to such mortgage, and recorded, reads, "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, *and that said*

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debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt honestly due and owing from the mortgagor to the mortgagee." The mortgage and note were admitted in evidence against the exception of the defendant. The defendant also excepted to the refusal of the court to comply with its request to charge that the mortgage was void under the laws of New Hampshire, because the oath, taken by the mortgagor and mortgagee, shown by the mortgage recorded, did not contain the clause, "and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage." Hence, the contention is, whether the omission of this clause, from the oath taken and recorded, rendered the mortgage, upon which the plaintiff relies to establish his title to the personal property, in contention, void under the laws of New Hampshire. Section 12 of chapter 140 of the laws of New Hampshire reads, "No such mortgage shall be valid against any person except the mortgagor, his heirs, executors or administrators, unless possession is delivered or the mortgage is sworn to and recorded in the manner herein prescribed." The decisions of the Supreme Court of New Hampshire, given in evidence, show that such mortgages, to be valid under the laws of New Hampshire, must be executed and recorded in substantial compliance with every provision of the statute; if the mortgage is given to secure the mortgagee for a debt due him from the mortgagor, the condition and oath must describe it as a debt; if to secure a liability, they must so describe it; and that a liability is not covered by the term debt; if the whole sum secured is described as a debt, when a part of it is merely an indemnity, unless separately described, the mortgage is void against creditors; but if they are separately described, the mortgage will be invalid only as to the part misdescribed. *Belknap* v. *Wendell*, 31 N. H. 92. If the proper oath is taken and the magistrate administering it neglects to sign the certificate, such mortgage is invalid

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against attaching creditors, although the mortgage with the unsigned certificate is recorded. *Hill* v. *Gilman*, 39 N. H. 88. In this case it is held that the provisions of the statute in regard to the execution and record of such mortgages, "must, in general, be strictly complied with." *Parker* v. *Morrison*, 46 N. H. 280, holds that such mortgages cannot be given to a stranger to secure a debt due to another, and that the oath must verify the truth, validity and justice of the debt, or of the liability or of the agreement, or it will not be invalid, except between the parties. See also *Kennard* v. *Gray*, 58 N. H. 51; *Sumner* v. *Dalton*, 58 N. H. 295. These decisions hold that all the provisions of the statute in regard to the execution and record of such mortgages must be fully complied with to render them valid against anyone except the parties thereto. The clause omitted from the oath taken by mortgagor and mortgagee and recorded, in the case at bar, is not supplied by any other clause of the oath. It relates to the creation of the debt, and not to its justness between the parties. The mortgage might be given to secure the debt specified in its condition, and for no other purpose, and that debt might be a just debt, honestly due and owing from the mortgagor to the mortgagee and still the debt might have been created for the purpose of enabling the mortgagor to execute the mortgage. The omitted clause, therefore, contains a matter made essential, by the statute, to the validity of the mortgage between these parties, which is not supplied by any other clause of the oath taken and recorded.

The court should have complied with the request of the defendant in relation thereto. This view renders a consideration of the other questions discussed immaterial.

Judgment reversed and cause remanded.

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EST. OF ADELINE WHITE *vs.* EST. OF HIRAM S. WHITE.

January Term, 1897.

Present: ROSS, C. J., ROWELL, MUNSON and START, JJ.

Notes Surrendered Conditionally—Amendment.

The sister, being ill and not expecting to live, surrendered to the brother notes which she held against him, upon the condition that if she recovered and needed the interest he should pay it, and the notes were destroyed. She did recover and needed and demanded the interest, a part of which he neglected to pay. *Held*, both having deceased, that his estate was liable to her estate for the unpaid interest.

It is immaterial whether the interest might be recovered under the common counts, for the cause, having been referred, is to be treated as if any necessary amendments, within the power of the court to make, had been made; and the cause being an appeal from probate, any amendment was allowable.

The estate of the sister is not barred or estopped from prosecuting its claim against the estate of the brother by reason of the fact that before his decease her administrator had settled his account and her estate had been distributed to the heirs, in which distribution the brother had received his share, with full knowledge by all parties in interest that he claimed the notes as his own.

APPEAL from probate. Declaration, the common counts in assumpsit. Pleas, the general issue with notice and statute of limitations. Heard on the report of a referee at the September Term, 1896, Chittenden County, *Tyler*, J., presiding. Judgment for the claimant for the sums named in the report with interest. The defendant excepted.

Adeline White died in October, 1890, and Hiram in June, 1893. After the death of Adeline and before the death of Hiram, her estate was settled by her administrator who investigated this claim against Hiram and declined to prosecute it unless indemnified by the heirs. In the settlement and distribution of her estate, Hiram received his portion as an heir and no appeal was taken. It was understood by all that Hiram claimed the notes as a gift.

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After the decease of Hiram and the appointment of commissioners upon his estate, this claim was presented in the name and with the authority of Adeline White's administrator, but in the interest, first, of one of the heirs, and, afterwards of the assignee of one of the heirs, of Adeline White, who indemnified the administrator.

C. M. Wilds and *E. R. Hard* for the defendant.

The proceedings in the settlement of Adeline White's estate constitute a bar to the prosecution of the present claim. Justice requires that the claimant estate should be held estopped. *Tinkham* v. *Smith*, 56 Vt. 187; *Spaulding* v. *Warner*, 59 Vt. 646.

There was no promise on the part of Hiram which created a debt, he was to pay her during life what she needed in lieu of, and not exceeding, the interest, and, in the event of her death, it was her purpose to release the interest as well as the principal.

Interest is not recoverable under a count for money had and received or money lent.

Roberts & Roberts for the plaintiff.

The interest was a legal incident of the original loan. Adeline forgave Hiram the principal, but retained the interest to accrue during her life. This was not the creation of a new obligation, but a reservation of a part of the original.

This case having been referred stands upon the facts and not upon the pleadings.

A partial settlement and distribution of Adeline's estate among her heirs is effective only to the extent of the distribution. Nor is the claim affected by the fact that some of the heirs doubted it, nor that the administrator refused to prosecute without indemnity. No matter upon what inducement he has engaged in the prosecution. It is enough that the proper party is in court.

START, J. It appears from the referee's report that Hiram

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S. White and Adeline White were brother and sister. In March, 1886, Adeline was ill, and her condition was such that she deemed it prudent to make her will, and to dispose of two notes she held against Hiram. She made her will and delivered the notes to Hiram to dispose of as he saw fit, and he destroyed them. Adeline intended the notes should not be a part of her estate to be distributed under her will, and that Hiram should be released from the payment of any part of the principal, and from paying the interest thereon in the event of her death; but there was an understanding between them, that, if she recovered and needed the income which the notes would have produced had they not been surrended, Hiram should see that she had it during the remainder of her life. She recovered, and lived until October, 1890. During this time, she needed the income for her support and maintenance, and, from time to time, applied to Hiram for money; and he sent her or handed her different sums, at different times, as she needed, to an amount equal to what the interest on the notes would have been to the summer of 1889, when he neglected and refused to furnish her any further sums, although payment of such interest was demanded by her, and although he knew her needs were practically the same they had theretofore been during the time covered by his payments. The referee also finds, that, during the last six years of her life, she had on deposit in a bank fifteen hundred dollars; but, notwithstanding this finding, he reports that she needed the income which the notes would have furnished had they not been surrendered.

The finding that Adeline intended that Hiram should be released from the payment of interest in the event of her death, and that there was an understanding between them, that, if she recovered and needed the income which the notes would have given her had they not been surrendered, Hiram should see that she had it during the remainder of her life, must be construed together; and, when so considered, it is

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clear that the release in the event of her death referred to death from her then illness, and that it was not intended that Hiram should be released from the payment of the equivalent of interest, if she needed it, unless she died from her then illness. Therefore, a condition was attached to the surrender of the notes, that, if she recovered and needed the income which the notes would have yielded had they not been surrendered, Hiram should pay it; and the notes were surrendered with this understanding. She having recovered and needed the income, the condition attached to the surrender of the notes was operative and binding upon Hiram; and the income the notes would have produced had they not been surrendered became due and payable absolutely and without any contingency. On the neglect or refusal of Hiram to pay the same on demand, a cause of action accrued against him; and this cause of action was not extinguished by her death; and nothing has been done, or omitted, by her heirs, or the legal representatives of her estate, that has the effect to work an estoppel or bar the action.

Whether Adeline was in need of the income the notes would have given her if they had not been surrendered, was a question of fact for the referee; and the defendant is concluded by the finding. The evidence is not referred to, and there is nothing in the report from which we can say that the finding was upon insufficient evidence. She may have needed more money than she expended, and we cannot say that she did not need the money deposited in the bank and the income the notes would have yielded.

The defendant insists that the interest cannot be recovered under the common money counts in assumpsit. The cause having been referred and tried by a referee, judgment must be rendered according to the facts reported, if the county court had power to allow an amendment to the declaration that would include the item of interest, if such amendment was necessary. *Dennis* v. *Stoughton*, 55 Vt. 371; *Granite*

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Co. v. *Farrar*, 53 Vt. 585. As the cause came to the county court by appeal from the probate court, the county court could allow such amendments to the declaration as the nature of the demand required. *Cutting* v. *Ellis's Estate*, 67 Vt. 70.

Judgment affirmed, and cause certified to the probate court.

JAMES BROWN *vs.* THE TOWN OF MOUNT HOLLY.

January Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Defect in Highway—Duty of Town—Complaints of Suffering Admissible.

Towns are not liable, absolutely and without regard to their own negligence, for injuries occasioned by the insufficiency and want of repair of their bridges and culverts.

When an accident occurs through a latent defect in a highway, the question arises, whether the town was at fault in not foreseeing and guarding against the defect, or in not learning of and repairing it before the accident; and these questions should be submitted to the jury.

Complaints of present suffering, to be admissible, need not have been made to a nurse or a physician.

CASE for injury through a defect in a highway. Plea, the general issue. Trial by jury at the September Term, 1896, Rutland County, *Rowell*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The accident occurred on Tuesday. The defendant requested the court to charge, "that if the culvert was suitably built, and remained apparently safe and secure, and there was no apparent change in its condition before the accident, and the accident was occasioned by the parting of the stones covering the culvert, then the defect would be

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latent and the town not liable, and that this would be true although the hole was there a few hours before the accident, or even the Sunday night before, unless the jury should find that by due diligence the town ought to have known of the defect; that the town is chargeable only with the care and prudence of an ordinarily prudent man." The court refused to charge as requested, but charged that the town's liability was not to be measured by ordinary care and prudence; that the statute imposed upon it the duty of keeping the culvert in good and sufficient repair, and if it had neglected that duty and the culvert was insufficient and out of repair, it was liable, if the plaintiff's case was otherwise made out, whether it knew of the defect or not and whether it was, or not, negligent in not knowing it. To this refusal and charge the defendant excepted.

W. H. Lord and *G. E. Lawrence* for the defendant.

The court erred in refusing to charge as requested and in the charge as given. *Mullen* v. *Rutland*, 55 Vt. 77; *Ozier* v. *Hinesburgh*, 44 Vt. 220; *Prindle* v. *Fletcher*, 39 Vt. 255.

The court erred in permitting the plaintiff's sons to testify to his complaints. Complaints of suffering made at the time of the injury have been admitted as part of the *res gestae*. Complaints to a physician, as the basis for a prescription, have also been admitted, though made afterwards. There have been cases also where the nurse has been permitted to testify to complaints made by her patient. But we submit that the present case does not fall within the rule governing these cases.

W. W. Stickney, *J. G. Sargent* and *H. W. Parker* for the plaintiff.

The evidence of complaints was admissible. *Aveson* v. *Kinnaird*, 6 East. 188; *Ins. Co.* v. *Mosley*, 8 Wall. 397: I Green. Ev. § 102; *State* v. *Howard*, 32 Vt. 380; *Kent* v. *Lincoln*, 32 Vt. 591; *Earl* v. *Tupper*, 45 Vt. 275; *Hathaway* v. *Ins. Co.*, 48 Vt. 335; *Knox* v. *Wheelock*, 54 Vt. 150; *Drew* v. *Sutton*, 55 Vt. 586; *State* v. *Fournier*, 68 Vt. 262.

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The court correctly refused to charge as requested. This was not a latent defect for it might have been discovered by examination. *Prindle* v. *Fletcher*, 39 Vt. 255; *Furnell* v. *St. Paul*, 20 Minn. 117; *Rapho* v. *Moore*, 68 Pa. 404; Elliott, Roads and Streets, 462.

The town's duty is not limited to the prudence of an ordinarily prudent man. V. S. 3432, 3490; *Howe* v. *Castleton*, 25 Vt. 162; *Prindle* v. *Fletcher*, 39 Vt. 255; *Hodge* v. *Bennington*, 43 Vt. 450; *Horton* v. *Ipswich*, 12 Cush. 488; *George* v. *Haverhill*, 110 Mass. 506; *Bodwell* v. *North Andover*, 110 Mass. 511, note; II Shear. & Red. Neg. § 337; II Dill. Mun. Corp. § 1000.

The court correctly charged that the town was liable, if the plaintiff's case was otherwise made out, whether it was, or not, negligent in not knowing it. *Bardwell* v. *Jamaica*, 15 Vt. 438; *Chapman* v. *Milton*, 31 W. Va. 384; *Boucher* v. *New Haven*, 40 Conn. 456; II Beach, Pub. Corp. § 1523; II Shear. & Red. Neg. § 337, 338.

The cases which maintain the doctrine that the town must be found guilty of negligence, belong to those jurisdictions which hold the town subject to a common law duty; but the rule has no application to the New England states which hold that the town is under no duty to keep its highways in repair except as the duty is imposed by statute. In these states the duty is to be found stated in the statute, and in the Vermont statute it is an absolute duty, without regard to negligence. The town is bound, without qualification, to keep its bridges and culverts "in good and sufficient repair."

START, J. The plaintiff's evidence tended to show, that, while riding over a culvert which the defendant was bound to maintain and keep in repair, his horse stepped into a hole that had been there about forty-eight hours, caused by the spreading of the stone slabs covering the culvert, and the dirt covering the same working through. The defendant's evidence tended to show, that there was no hole in the

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culvert until the plaintiff's horse broke through it, on the occasion of the accident; that the culvert was properly and securely built, with side walls covered with large flagstones, which, at the time of the accident, were covered with gravel and dirt to the depth of about eighteen inches; that said culvert was, to all appearances, in perfect condition; that the defect could only have been discovered by crawling into the culvert; and that the defendant's road commissioner had, from time to time, inspected the road where the culvert was and discovered no fault in the same.

This evidence tends to show that the defect causing the injury complained of, was so far latent, sudden and unforeseen that its occurrence could not reasonably have been anticipated and guarded against, and that the accident occurred without fault on the part of the town. The evidence fairly presented for the consideration of the jury the question, whether the town officers charged with the duty of keeping the culvert in repair ought, as careful and prudent men, to have anticipated that such a defect would be likely to occur and guarded against its occurrence; and, if not negligent in this respect, whether, by the exercise of due care and prudence, they could, or ought to, have seasonably discovered the defect and remedied it, and these questions should have been submitted to the jury.

When a defect in a highway is latent, and when a sudden and unforeseen defect occurs without fault on the part of the town, the town is not chargeable for the damage resulting from such defect, unless it has been in default in respect to getting seasonable knowledge of the defect, or unless, having such knowledge, it was reasonably practicable to have repaired the defect or put up a warning or barrier before the happening of the accident. In such cases, the questions, whether the defect occurred without the fault of the town and whether the town was wanting in care and prudence in not seasonably discovering and repairing the defect, are for the jury. *Campbell* v. *Fair Haven*, 54 Vt.

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336; *Ozier and wife* v. *Hinesburgh*, 44 Vt. 220; *Willard* v. *Newbury*, 22 Vt. 458; *Kelsey* v. *Glover*, 15 Vt. 708.

In *Mullen* v. *Rutland*, 55 Vt. 77, the defendant's surveyor built a barricade to prevent travelers from driving upon a bridge that was being repaired; and the court held, that, if the town performed its full duty and built a barricade at nightfall sufficient in height and strength, and in the right place, and had no knowledge or reason to suppose or suspect that some unforeseen casualty would happen to it, the town would not be liable.

In *Prindle* v. *Fletcher*, 39 Vt. 255, the plaintiff was traveling upon a highway, when the ground gave away under his horse, through some latent defect which was not known and was not discoverable; and the court, in holding that the defendant was not liable, in the course of the opinion, said: "It was not the design of the statute to require impossibilities of the town, and to make it the absolute insurer against all accidents and injuries caused by defects in highways. But it was designed to hold the town to insure against accidents and injuries caused by defects existing through any fault of the town."

The plaintiff was permitted to show by his sons the complaints he made of pain that he was suffering at the time he made the complaints. This testimony was properly received. It is not necessary that such complaints be made to a physician or nurse, in order to render them admissible. *Knight and wife* v. *Smythe*, 57 Vt. 529; *State* v. *Howard*, 32 Vt. 380; *Kent* v. *Lincoln*, 32 Vt. 591; *Drew* v. *Sutton*, 55 Vt. 586; *State* v. *Fournier*, 68 Vt. 262.

Judgment reversed and cause remanded.

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LAMOILLE COUNTY SAVINGS BANK AND TRUST CO. *vs.* MURRAY BUCK, et al.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Appeal from Chancery.

No appeal lies to this court from the court of chancery upon the taxation of costs alone.

PETITION to foreclose a mortgage. Heard as of the April Term, 1895, Lamoille County, upon an appeal from the clerk's taxation of costs. *Start*, Chancellor, disallowed certain items in defendant Hunt's bill of costs, from which disallowance he appealed.

P. K. Gleed for the petitioner.

B. A. Hunt, *pro se*.

TAFT, J. It appears from the record in this cause that no appeal was taken from the final decree. It is only from such a decree that one can be had. V. S. 981; *Nelson* v. *Brown*, 59 Vt. 600. The cause, therefore, is not properly in this court and should be remanded to the court of chancery. The appeal was taken from the taxation of costs only, and will not lie. *Mott* v. *Harrington*, 15 Vt. 185. The court rarely if ever reverses a decree on the question of costs alone. *Hastings* v. *Perry*, 20 Vt. 272; *Sanborn* v. *Kittredge*, *ibid* 632; *Sanders* v. *Wilson*, 34 Vt. 318; *Lamoille Valley R. Co.* v. *Bixby*, 57 Vt. 548; *Flannery* v. *Flannery*, 58 Vt. 576.

Appeal dismissed and cause remanded.

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JOHN K. DYER *vs.* W. R. DEAN, et al.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL and TYLER, JJ.

Demurrer in Answer Waived unless Brought Forward—Hearing on Petition and Answer—Assignment to Wife of Mortgagor No Waiver.

A demurrer incorporated in the answer is waived unless brought forward for hearing before the cause is heard on petition and answer.

Where a cause is heard upon petition and answer, all matters of fact well pleaded in the answer must be treated as true though not responsive and though alleged upon belief only.

An assignment of the mortgage debt to the wife of the mortgagor does not operate as a merger, though she have in the premises inchoate rights of homestead and dower.

It is no defense for a second mortgagee that the transfer of the first mortgage debt to the petitioner was by way of gift.

The answer alleged that the second mortgage was taken upon the fraudulent representation of the mortgagor, that there was no prior encumbrance and that the petitioner knew this fact when he acquired title to the first mortgage. *Held*, no defense.

PETITION to foreclose a mortgage. Heard on petition and answer at the June Term, 1896, Bennington County, *Start*, Chancellor. Decree for the petitioner. The defendant Graves appealed.

The petition alleged that the defendant W. R. Dean and his then wife, Minerva, executed the mortgage to one Houghton and the same was duly recorded; that upon the death of Houghton his heirs assigned the debt and mortgage to Mary F. Dean, who was then the wife of W. R. Dean, the mortgagor; that afterwards Mary F. Dean assigned to the petitioner; that W. R. Dean had executed a second mortgage to Colburn and Ames as trustees; that both trustees had deceased and that the defendant Graves had been appointed trustee in place of Ames and administrator upon the estate of Colburn. The case was heard

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upon the petition and the answer of Graves. The material allegations of the answer, besides those which appear in the opinion, were the following: that W. R. Dean had executed the said mortgage to Colburn and Ames, trustees, to secure the payment of the amount due from him upon settlement of his account as trustee under the same trust, representing that there was no prior encumbrance upon the mortgaged premises; that Colburn and Ames in reliance upon the representation accepted the mortgage and neglected to take other available means to collect the debt until all other means had been lost; that Mary F. Dean and the petitioner knew all these facts when they received their respective assignments. The defendant insisted that the mortgage sought to be foreclosed should be postponed to his.

F. C. Archibald for the petitioner.

The defendant cannot avail himself of the fraudulent representations of the mortgagor. The second mortgagees were bound to know what the record disclosed.

There was no merger. Preston, Merger, pp. 5 and 6; *Andrus* v. *Vreeland*, 29 N. J. Eq. 394; *Belknap* v. *Dennison*, 61 Vt. 520.

W. B. Sheldon for the defendant.

There was a merger. *Guernsey* v. *Kendall*, 55 Vt. 201; *Belknap* v. *Dennison*, 61 Vt. 520.

The answer does not admit but challenges the priority of the Houghton mortgage. The petitioner and his assignor knew of the fraud when they acquired their interests and equity demands that they should not be allowed to foreclose the defendant.

TAFT, J. The defendant Graves answered and incorporated in his answer a demurrer, assigning as special causes, want of parties and want of a proper allegation of an assignment of the mortgage to the petitioner.

The first three points in the brief of the defendant Graves are upon questions raised by the demurrer. The cause was

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heard upon the petition and answer; the demurrer was not brought forward for hearing and therefore the questions arising under it were waived and will not be considered by this court. *Wade* v. *Pulsifer*, 54 Vt. 45; *McLane* v. *Johnson*, 59 Vt. 237; *Holt* v. *Daniels*, 61 Vt. 89.

The cause was heard upon petition and answer. There being no denial of the latter by way of replication, the facts therein set forth, if well pleaded, must be taken as true: *Doolittle* v. *Gookin*, 10 Vt. 265; and this is the rule although the answer is not responsive to the petition; *Slason* v. *Wright*, 14 Vt. 208; and although made by way of belief; *Gates* v. *Adams*, 24 Vt. 70; and if the facts so stated constitute a full defence, the bill must be dismissed. *Slason* v. *Wright*, 14 Vt. 208. The question then arises if the facts set forth in the answer constitute a full defence to the petitioner's claim.

The defendant Graves in his answer does not aver that the note held by the petitioner has been paid. He says that "whether said note is now justly due and owing and has not been paid according to the effect of the same, this defendant has not sufficient knowledge or information to form a belief so as to admit or deny the averment of the petition in this respect," but he avers that the effect of the transfer of the note and mortgage to Mary F. Dean, as stated in the petition, was a merger of the claim, and, in law and in equity, a payment and extinguishment of the debt, by a merger of the title under said mortgage in the superior title of said Mary F. and her husband W. R. He does not deny the transfer and assignment of the note and mortgage, but rather the legal effect of it. That is, he claims as matter of law, that upon the transfer of the debt and mortgage to Mary F. the same was extinguished,—she then being the wife of the mortgagor and having an inchoate right of homestead and dower in the premises. But this is not true as matter of law. A married woman may purchase or take the transfer of a debt secured by mortgage upon the real

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estate of her husband and in which she may have inchoate rights, and hold the same against her husband, without a merger of the debt in any superior title of herself and husband.

The defendant further answers that there was no valid and bona fide assignment, sale and transfer of the note and mortgage by Mary F. Dean to her son John K. Dyer; he does not deny the assignment in form, but states that it was made without any good, valuable or sufficient consideration, and therefore void as to the defendant, and that such pretended assignment, etc., were made for the purpose of reviving said mortgage debt which had been paid and satisfied. It is the legal effect of the assignment which he challenges. This claim is not tenable. If Mary F. Dean held the mortgage and the note secured thereby, she had a right to transfer the same to the petitioner, and he could hold the same, even if it was a gift from his mother to him, and any person having a subsequent interest in the premises could not defend by showing that the note and mortgage came to the petitioner by way of gift. There is nothing in the answer which constitutes a defence to the claim of the petitioner. The subsequent allegations with reference to the validity of the defendant's claim are not in question, and constitute no defence to the rights of the petitioner. They simply give the defendants a right to redeem. The decree of the chancellor was correct, and the same is

Affirmed and cause remanded.

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TOWN OF BARRE *vs.* SCHOOL DISTRICT NO. 5 IN BARRE.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Division of School Money among Taxpayers Illegal.

Neither before nor since the act of 1892 could a school district divide among its taxpayers money devoted by law to school purposes.

By Acts of 1894, No. 165, § 73, the plaintiff was authorized to maintain this action in its own name.

ASSUMPSIT. Heard upon an agreed statement of facts at the September Term, 1896, Washington County, *Taft*, J., presiding. Judgment for the plaintiff for the stipulated sum with interest since April 1, 1893. The defendant excepted.

The defendant was a school district until Acts of 1892, No. 20 and 21 took effect. March 28, 1893, it voted "to divide the surplus funds in the treasury among the taxpayers of the district, *pro rata*, on the grand list." The treasurer had on that date after the settlement of the pecuniary affairs of the district, $83.12, derived from taxes of the district and State, the public moneys, and the Huntington fund, and on the same day divided the money in accordance with the vote. The plaintiff is the town mentioned in § 73 of No. 165 of the Acts of 1894, and the defendant is entirely within the present limits of the plaintiff. Demand was seasonably made after April 1, 1893.

Richard A. Hoar for the defendant.

This action should have been brought in the name of the Town School District, as in *Barre* v. *Cook*, 68 Vt. 88.

The action cannot be maintained because the money had been divided before April 1, 1893, when the law of 1892 took effect. *School District No. 16* v. *Concord*, 64 N. H. 235.

John W. Gordon for the plaintiff.

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The case is ruled by those already decided. *Barre* v. *School District No. 13*, 67 Vt. 108; *School District* v. *Pierce*, 67 Vt. 317.

START, J. The money the defendant voted to divide among its taxpayers was, by law, devoted to the purpose of maintaining public schools; and the defendant held it in trust for this single purpose. It had no right or power, either before or after the act of 1892, abolishing school districts, took effect, to divert any of it from the purpose to which the law had devoted it; and its attempted division of the funds among its taxpayers was null, and is not a defence to this action. The case of *Barre* v. *School District No. 13*, 67 Vt. 108, and the same against Cook, 68 Vt. 88, are sufficient authority for this holding. Section 73 of No. 165 of the Acts of 1894 provides, that school funds remaining in the hands of any old school district in the town of Barre may be recovered in the name of the town. Therefore, the action is properly brought by the town of Barre.

Judgment affirmed.

HELEN PARKHURST *vs.* JOSEPH KRELLINGER.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and START, JJ.

Parent and Child—Implied Promise—Evidence.

The fact that a daughter is of full age and emancipated is no reason why the father may not be found liable for care and support furnished her at his request and under circumstances which justify the inference that payment was contemplated on both sides.

The defendant claiming that his daughter was over eighteen years of age was properly allowed to show that, before any controversy had arisen, he had made for her a birthday party at which there was a cake with figures thereon indicating her age.

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GENERAL ASSUMPSIT. Plea, the general issue. Trial by jury at the September Term, 1894, Washington County, *Munson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

It appeared that the board and nursing were necessaries, and the plaintiff's evidence tended to show that the daughter was a non-emancipated minor. But the plaintiff claimed that since the daughter was still a member of the defendant's household the defendant would be liable, on an implied contract, by reason of his relationship and the fact that the daughter would be a public charge without his support, even though the daughter were over eighteen years of age. But the court held otherwise, and charged the jury upon this point as quoted in the opinion.

John W. Gordon for the plaintiff.

There was evidence tending to show an implied promise and that question should have been submitted to the jury. *Gordon* v. *Potter*, 17 Vt. 353; *Thayer* v. *White*, 12 Met. 343; *Paddock* v. *Kittredge*, 31 Vt. 378, 383.

The evidence as to the figures upon the birthday cake should have been excluded as hearsay. The declaration was not against the defendant's interest. It was no more admissible than would have been a letter written by the defendant. *Higham* v. *Ridgway*, 10 East. 109; *Barber's Admr.* v. *Bennett*, 62 Vt. 50; *Godding* v. *Orcutt*, 44 Vt. 54; *Freeborn* v. *Smith*, 2 Wall. 160; *Towle* v. *Stevenson*, 1 Johns. Cas. 110; *Baker* v. *Kelly*, 41 Miss. 696: 93 Am. Dec. 274 and note.

R. A. Hoar for the defendant.

The plaintiff claimed to recover first on the ground of an express promise; second on the ground of an implied promise arising from the fact, which her evidence tended to show, that the daughter was a non-emancipated minor; third, on the ground of an implied promise arising from the fact that the services were necessary and the child still a member of

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her father's household. Upon the first claim the jury must have found, under the charge, that there was no express promise; upon the second, that the daughter was of age and emancipated; and as to the third claim they were properly charged that the father was not liable upon an implied promise.

START, J. This action is brought to recover for boarding and nursing Nellie Krellinger, an unmarried daughter of the defendant. It appeared that Nellie had been ill for some weeks before going to the plaintiff's house, during which time she had been at her father's home; that, for some time previous to her illness, but for how long a time did not appear, Nellie had been away at work, and, while so away, was taken sick and returned to her father's house; that, during her illness, she had no means for her support and was unable to support herself by work; and that her father was possessed of sufficient means to provide for her. It appeared that Nellie's mother was a person of violent temper and was frequently intoxicated. The plaintiff's evidence tended to show, that the mother, at this time, had a strong dislike for Nellie; that, on the occasion of Nellie's leaving her father's home before going to the plaintiff's house, she had beaten her so that she was insensible and driven her from home; that the defendant was unable to control his wife's conduct toward Nellie; and that it would have endangered Nellie's life to have remained at home with her mother. It appeared that Sarah Parkhurst, a daughter of the plaintiff, had been at the defendant's taking care of Nellie and had refused to remain any longer, and that Nellie left the defendant's house with the plaintiff and her daughter and went to the house of one McCarty, and from there, soon after, went to the plaintiff's house. The plaintiff's evidence tended to show, that she boarded and nursed Nellie upon the credit of the defendent; that defendant was present when Nellie left home and made no objection to her going; that he told the plaintiff while Nellie

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was at McCarty's to take Nellie up to her house and give her a good home and take good care of her, and he would see that she had her pay for it. The evidence further tended to show, that, soon after Nellie went to the plaintiff's house, the defendant came there; and that the plaintiff then asked him if he was willing Nellie should stay there, and he said he was, telling her to keep her and he would see that she had her pay. The court instructed the jury, among other things, as follows: "Now, if you find from the evidence that Nellie Krellinger was over eighteen years of age at the time these services were rendered, then the plaintiff is not entitled to recover upon the ground of an implied promise; but she can still recover upon the ground of an express promise, if yon find from the evidence that the express promise was made." The plaintiff excepted to the instruction, that, if they found that Nellie was over eighteen years of age, the plaintiff could not recover upon an implied promise.

We think the instruction excepted to was error. The evidence tended to show facts and circumstances from which the jury should have been at liberty to have found a contract in fact. They must have understood from the instruction that they were not at liberty to find such contract, unless they found that the defendant promised in express words. To entitle the plaintiff to recover, it was not necessary that the jury should find that the defendant said that he would pay, or that he said he would see that the plaintiff was paid. If the defendant told the plaintiff to take his daughter to her house, give her a good home, and take good care of her, such facts, taken in connection with other facts and circumstances which the evidence tended to show; such as the fact, that the daughter was sick, needed shelter, food, lodging and care, and was unable to provide them; that, while she was at home, her life was in danger; that, while sick, she had been driven from home by her mother; that the defendant was her father and able and willing to provide for her, would justify a finding that the defendant expected to pay

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for the service, and the plaintiff expected to receive payment from him. Such mutual expectation, under the circumstances disclosed by the evidence, would constitute a contract in fact and entitle the plaintiff to recover. Chitty on Contracts, 17, 18; *Gordon* v. *Potter*, 17 Vt. 348; *Goetschins* v. *Hunt*, 5 N. Y. Supp. 307; *Patton's Exr.* v. *Hassinger*, 69 Pa. St. 311; *Wood* v. *Gill*, 1 N. J. L. 449; *Ives* v. *Hulet*, 12 Vt. 314; *Swain* v. *Tyler*, 26 Vt. 9; *Rowell* v. *Vershire*, 62 Vt. 405.

The defendant claimed that his daughter was over eighteen years of age, and, upon this issue, was allowed to show that she had a birthday party, on which occasion there was a birthday cake with figures thereon indicating her age. The party was before the controversy arose and at a time when the defendant could have no motive in representing the age of his daughter to be different from what it was in fact; and we think the evidence must be regarded as in the nature of an act of the defendant that rendered his claim more probable, and was admissible.

Judgment reversed and cause remanded.

JAMES M. KENT *vs.* L. D. MILES.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

False Imprisonment—Warrant—Arrest.

The clerk may issue a warrant in vacation for the arrest of one indicted; therefore he may deliver to an officer in vacation a warrant issued during the term.

When a respondent is arrested upon a warrant which commands the officer to have him forthwith before the county court, and that court is not in session, it is the officer's duty to detain him until the court again convenes and he may lawfully commit him to jail for safe keeping.

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***In re Durant*, 60 Vt. 176 and *Kent* v. *Miles*, 68 Vt. 48, followed.**
This case is not controlled by V. S. 1701 which relates to process by which the officer is directed to commit to jail.

TRESPASS for false imprisonment. Pleas, the general issue and special pleas of justification. Replication, *de injuria*. Trial by jury at the September Term, 1896, Washington County, *Taft*, J., presiding. Verdict directed for the defendant. The plaintiff excepted.

T. J. Deavitt, *W. W. Lapoint* and *John W. Gordon* for the plaintiff.

The warrant, dated September 14 and delivered October 5, commanded something which was, on the face of it, impossible, the court having already adjourned. This, the defendant knew, for he had himself, as sheriff, declared the court adjourned. Therefore the warrant is no protection to the defendant. *In re Terrill*, 52 Kan. 29: 39 Am. St. 327; 16 Am. Law Reg. 660 and cases there cited. As analogous cases see, *Tenney* v. *Harvey*, 63 Vt. 520; *Clayton* v. *Scott*, 45 Vt. 386; *Shaw* v. *Peckett*, 25 Vt. 426; *Vaughn* v. *Congdon*, 56 Vt. 111; *State* v. *Bruce*, 68 Vt. 183; *Brock* v. *Stimson*, 108 Mass. 520: 11 Am. Rep. 390.

W. W. Miles for the defendant.

TYLER, J. It appears that the plaintiff was indicted for perjury at the September Term, 1887, of Orleans county court; that a bill of indictment was returned into court and filed on the 14th of the same September; that a warrant for the plaintiff's arrest was then issued but was not delivered to the defendant until October 5th, several days after the close of that term. The defendant, as sheriff of the county, arrested the plaintiff at Montpelier in the county of Washington on the day he received the warrant, and on the following day took him and committed him to the jail in Orleans county. On the 7th of October the defendant released him from custody but rearrested him on the same day upon another warrant issued on that day by the clerk

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of Orleans county court. It is for these alleged illegal arrests and the confinement that the plaintiff seeks to recover damages.

It was held in Durant's case, 60 Vt. 176, that the clerk might issue a warrant in vacation for the arrest of a person against whom an indictment had been found; therefore there can be no question as to his right to deliver to an officer in vacation a warrant issued in term time.

The direction in the warrant was to apprehend the body of the plaintiff and have him forthwith to appear *before the county court* in and for said county of Orleans, at Newport, to answer, etc. It was held in *Kent* v. *Miles* 68 Vt. 48, that the court not being in session when the defendant arrived at Newport with the plaintiff it was the defendant's duty under the warrant to keep and detain him until the court again convened, and that he could lawfully commit him to jail for safe keeping. That decision is conclusive of the legality of the arrest and commitment on the first warrant. The case is not controlled by V. S. 1701, which relates to service of legal process where the officer is directed by the process *to commit to jail.*

Durant's case is full authority as to the legality of the arrest and commitment upon the second warrant.

Judgment affirmed.

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THE MONTPELIER SEMINARY, apt. *vs.* ELIZA SMITH'S ESTATE.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Contract Void for Want of Consideration.

The decedent executed to the claimant a promissory note for one thousand dollars payable one year after date, with interest annually, receiving from the claimant therefor a writing acknowledging the receipt of one thousand dollars and promising, in consideration thereof, to pay the intestate during her life an annuity of sixty dollars. Nothing was ever paid under either contract, and there was no consideration for the note unless in the promise to pay the annuity. *Held*, that the writings must be read together, and, when so read, showed that there was no obligation to pay the annuity until the one thousand dollars had been paid, and, consequently, that there was no consideration for the note.

The case is not affected by the fact that the claimant, a charitable corporation, impliedly promised to devote the fund to the objects for which the corporation was created, since a promise to do its legal duty could not constitute a consideration.

APPEAL from a decree of the probate court for the district of Chittenden, accepting the report of commissioners disallowing the claim of the appellant. Pleas, the general issue and statute of limitations. Heard upon the report of a referee at the September Term, 1896, Chittenden County, *Tyler*, J., presiding. Judgment, *pro forma*, for the claimant. The defendant excepted.

The note was given December 24, 1884. Mrs. Smith died between December 24, 1893, and December 24, 1894.

T. E. Wales and *O. P. Ray* for the defendant.

Besides the cases cited in the opinion see, I Parsons, contr. 234; *Northrop* v. *Hale*, 73 Me. 66; II Parsons, Notes and Bills, 55; *Copp* v. *Sawyer*, 6 N. H. 386; *Flint* v. *Pattee*, 33 N. H. 520: 66 Am. Dec. 742; *Hill* v. *Buckminster*, 5 Pick. 391; *Parish* v. *Stone*, 14 Pick. 198; *Pearson* v. *Pearson*, 7

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Johns. 26; *Harris* v. *Clark*, 3 N. Y. 93; *Starr* v. *Starr*, 9 Ohio St. 75; *Blanchard* v. *Williamson*, 70 Ill. 647.

If this arrangement was, in effect, to slumber until Mrs. Smith's death, it was an effectual attempt to make a will. *Hoeley* v. *Adams*, 16 Vt. 206; *Harris* v. *Clark*, *supra*.

The statute of limitations is a complete defense. It is not the endorsement but the payment evidenced by it which works a renewal, and in this case there was no payment. *Blanchard* v. *Blanchard*, 122 Mass. 558; *Egery* v. *Decrew*, 53 Me. 392.

Frank C. Partridge and *Dillingham, Huse & Howland* for the claimant.

The annuity contract was a sufficient consideration for the note. *Bolles* v. *Sachs*, 37 Minn. 315. Though worth less perhaps than the note it must have been worth a considerable sum, and mere inadequacy of consideration is no defense. *Giddings* v. *Giddings*, 51 Vt. 227, 236; *Harrington* v. *Wells*, 12 Vt. 505.

Apart from the annuity contract, the note may be supported as a subscription to a charitable institution. *Troy Academy* v. *Nelson*, 24 Vt. 189, 194; *Patchin* v. *Swift*, 21 Vt. 292; *Trustees Ky. Female Orphan School* v. *Fleming*, 10 Bush. 234; *Ladies' Inst.* v. *French*, 16 Gray 196; *Maine Central Inst.* v. *Haskell*, 73 Me. 140; *Collier* v. *Baptist Society*, 8 B. Mon. 68; *Helfenstein's Est.*, 77 Pa. 328.

The statute of limitations was interrupted by the payment of interest. The endorsements, though not in the handwriting of the payer, are evidence. V. S. 1216; *Bailey* v. *Danforth*, 53 Vt. 504; *Lawrence* v. *Graves*, 60 Vt. 657. An endorsement by the holder of the note with the express assent, and at the request of the promisor, amounts to proof. Buswell, Limitations, § 82; *Sibley* v. *Phelphs*, 6 Cush. 172; *Howe* v. *Saunders*, 38 Me. 350; *Corliss* v. *Grow*, 58 Vt. 702.

TAFT, J. The claim which is sought to be recovered in

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this cause, is evidenced by a promissory note for one thousand dollars, given by the testatrix to the claimant, payable one day after date, with interest annually.

At the time of its execution and delivery, the claimant gave the testatrix an agreement, reciting that, in consideration of having received from her that sum, it agreed to pay her annually during life, sixty dollars, the same being six per cent. interest upon the amount named in the note.

At the time of the delivery of the note to the claimant, it was agreed by parol between the parties, that the note should be treated as a cash payment. No money was ever paid by either party to the other, although interest was regularly indorsed annually, upon the note.

It was also agreed by parol, that the testatrix should indorse upon the agreement, or annuity contract, the sums agreed to be paid to her annually, as they became due. But the referee does not find that the testatrix ever made any indorsement on the contract, or did anything toward carrying out the parol agreement between her and the claimant. The contract has been lost.

The giving of the note and the annuity contract, was, in effect, but one transaction. They were executed at the same time, and related to the same subject matter. It was evident that no money was to be paid by any one, until the testatrix had in fact, paid the one thousand dollars to the claimant. The transaction was simply a promise of the testatrix to give the claimant at some future time, the sum of one thousand dollars.

A promise for the payment of money is void, unless made upon a legal consideration. As instances of such want of consideration, we have many cases in this State, viz: *Holley* v. *Adams*, 16 Vt. 206; *Carpenter* v. *Dodge*, 20 Vt. 595; *Smith* v. *Kittridge*, 21 Vt. 238; *Frost* v. *Frost* 33 Vt. 639; *Rogers* v. *Rogers*, 55 Vt. 73.

The question before us is, was there a consideration for the note in suit. It has been held in some cases, like agreements

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to marry, to submit matters to arbitration, etc., that mutual promises are sufficient to uphold the contract. And it was held in *Missisquoi Bank* v. *Sabin*, 48 Vt. 239; and *Lamson* v. *Lamson*, 52 Vt. 595, that mutual and concurrent promises, afford a sufficient legal consideration for the promise of each party.

The inquiry here is, was the agreement to pay the testatrix the interest on the thousand dollars, a sufficient consideration for the promise of the testatrix. The transaction between the parties, was in the form of a contract,—sometimes called bilateral—consisting of mutual promises to do some future act. In such contracts, if the consideration for a promise is another promise, the whole agreement may be contingent, to come into effect only at the will of one of the parties. And it is well settled both in England and with us, that such an agreement, so long as nothing is done by the promisee, is not binding on the promisor. This contract, it is evident, was not to take effect until the testatrix paid the money specified in the note. Then the promise of the claimant would become of force. It could have no force and no life, until the money was paid. Until that time, it had nothing to operate upon; there was nothing in the promise of the claimant, that can be held to be a consideration for the promise of the testatrix. If the thousand dollars was never paid, there was no liability whatever, upon the claimant, to pay the interest.

We do not put this upon the ground that the consideration was inadequate, but that there was a total want of consideration to support the obligation. The note was delivered as a gift; the testatrix intended it as a gift. The fact that she agreed that it should be treated as a cash payment, is immaterial, for it was not a cash payment, and no agreement of the parties could make it so. The agreement did not make the note money, nor create any consideration for it.

The referee states in express terms, "No value was received

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for Mrs. Smith's promise." This we construe as a finding of no value, unless the claimant's promise created one. We hold, the promise to pay interest constituted no consideration for the note.

It is further insisted by the claimant, that the note can be supported as a subscription to a charitable institution. There is no difference in respect to the necessity for a consideration to support a promise made in behalf of a charitable institution, and a promise for any other purpose. All simple contracts must be based upon a sufficient legal consideration.

It is claimed there was an implied promise on the part of the trustees of the Seminary, to see to, and make, an application of the money, under the obligation imposed upon, and assumed by them, as trustees, to enable the claimant to prosecute its duties of public instruction for which it was incorporated; and that this implied promise was the consideration of the testatrix's promise contained in the note.

The claimant is an educational institution, having capacity to take gifts for its general purposes. Nothing else being shown, it will be presumed that it can take gifts only for the purpose of public instruction; and that unless limited by the terms of the gift, it would have been the duty of the trustees to use the gift of Mrs. Smith,—had it been executed by the payment of the money—for the only purpose for which the Seminary could take, hold, and use property. Any implied promise therefore, would be no more nor less than a promise to do their duty, and constitute no consideration for a contract. Doing, or promising to do what one is already legally bound to do, is not a sufficient consideration to uphold a contract, whether the previous obligation arises by contract, or by law independently of it. *Cobb* v. *Cowdery*, 40 Vt. 25. No implied promise therefore, can be raised to support the promise made by the testatrix.

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There are authorities in some of our sister jurisdictions, indicating the doctrine above alluded to, that an implied promise on the part of the corporation or its trustees, to expend the money, is a sufficient consideration for the promise, and sufficient to support the contract. The doctrine is incidentally referred to in *Troy Academy* v. *Nelson*, 24 Vt. 189.

But that doctrine is not consistent with the principle, that where nothing whatever is said upon the subject, and no limitation annexed to the gift, and the corporation takes the funds with power to expend it only for the purposes of the corporation, the trustees are doing only what their duty requires them to do, and therefore, it cannot constitute a sufficient consideration for a promise.

In the cases in which this latter rule has been discussed, with scarcely an exception, there was an ample consideration shown in each case, without resorting to an implied promise on the part of the corporation, or its trustees.

The question of want of consideration in cases of subscriptions to aid educational and other public enterprises in this State, have arisen in *University of Vermont* v. *Buell*, 2 Vt. 48; *St. Treasr.* v. *Cross*, 9 Vt. 289; and *Troy Academy* v. *Nelson*, 24 Vt. 189. Each of these cases can well be sustained on the ground that a legal consideration may consist in loss, damage, or inconvenience, sustained by the party to whom the promise was made. The erection of the State House, and the University buildings, in two of the cases, and the labor, expense, and disbursement in obtaining a subscription of twenty thousand dollars to pay the debts of the institution, in the other, constituted sufficient considerations for the promises respectively made.

We hold there was no consideration for the note in question; that the testatrix received no benefit from it, nor was the claimant subjected to any loss, damage, or inconvenience; and that a promissory note without

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consideration, cannot be the subject of a valid gift from the maker to the donee.

The pro forma judgment reversed and judgment for the defendant, and ordered certified to the probate court.

Start, J., dissents.

IN RE OLIVER WELLS'S ESTATE, LUCIA R. WARD, apt.

Heard, May Term, 1896. Decided, May Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Devise not Void for Remoteness—Estate Tail—Judgment a Bar.

The testator, being advanced in years and having only one child, a married daughter, devised the use of his property to his widow during life, then to his daughter during life, and provided that upon her decease, after the death of his wife, the fee should vest in the heirs of his daughter's body and in default of such heirs, or in case the testator "should at any future time fail to have heirs of his body," then the fee should vest in a religious society. No provision was made for any heirs of the testator except those to come through his daughter. *Held*, that the devise to the society was not void for remoteness, the intention plainly being that it should vest upon the termination of the two life estates without heirs of the daughter's body surviving.

The widow having deceased, the probate court decreed to the daughter the life use of the estate. *Held*, that the decree amounted to a denial of her right to the fee and being unappealed from is conclusive against her.

The decree of the probate court unappealed from, between the same parties, upon the same facts, is as conclusive as a judgment of this court.

Moreover the decree was correct, for the daughter could in no event take more than a life estate.

It is immaterial that no decree has ever been made touching the fee, for the time for such a decree has not arrived. Upon the death of the daughter the fee will be decreed to the heirs of her body, if there be any, otherwise, to the society.

APPEAL from a decree of the Probate Court for the District of Chittenden, dismissing the petition of the

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appellant, praying to have the estate finally decreed to her. Pleas, the general issue and in bar. Traverse and replication. Trial by court at the March Term, 1896, Chittenden County, *Rowell*, J., presiding. Petition dismissed with costs. The appellant excepted.

S. C. Shurtleff and *J. J. Monahan* for the appellant.

The decree giving the petitioner the life use of the estate is not inconsistent with her present claim. No decree was made affecting the reversion, and it does not appear that any such question was raised. It is only matters of record that are concluded. *Rix, admr.*, v. *Heirs of Smith*, 8 Vt. 365; *Heirs of Smith* v. *Rix, admr.*, 9 Vt. 240; *Sparhawk* v. *Buell*, 9 Vt. 41; *Davis* v. *Eastman*, 66 Vt. 651.

The devise over is void for remoteness. *Village of Brattleboro* v. *Mead*, 43 Vt. 556. It depends upon an indefinite failure of lineal heirs and is not limited to a failure of heirs of his daughter's body. The rule against perpetuities is that the contingency must happen within a life or lives in being and twenty-one years and the period of gestation thereafter. Gray on Perpetuities, § 214; I Jarm., Wills, p. 255. The words, "die leaving no heirs of her body," mean that if the donee shall die before the donor, leaving no heirs, etc., the property shall pass according to the conditions. *McCormick* v. *McElligott*, 127 Pa. 230: 17 Atl. Rep. 896; *Webb* v. *Lines*, 57 Conn. 154: 17 Atl. Rep. 90; *Richardson* v. *Richardson*, 80 Me. 585: 16 Atl. Rep. 250; *Fisk* v. *Keene*, 35 Me. 349.

L. F. Wilbur and *Charles T. Barney* for the defendant.

Ross, C. J. On February 15, 1895, the appellant, Lucia R. Ward, preferred her petition to the Probate Court for the District of Chittenden, setting forth that she is the daughter and heir at law of Oliver Wells deceased, and legatee under his will, and that she is advised and believes that the Congregational church of Underhill has no interest in the estate under the provisions of the will; that the limitation

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or devise over to it is too remote and void; and that upon the death of Rebecca Wells all the estate vested in her absolutely. She prays that a decree may be made accordingly. The court appointed a time for hearing the petition, and gave due notice thereof. On the day appointed the Congregational church appeared and filed a motion to dismiss the petition, assigning, among other reasons, that the petitioner was concluded by a previous adjudication of the court, and that the will was not void as to the Congregational church for remoteness. Upon appearance and hearing, the probate court dismissed the petition. From this decree the petitioner appealed to the county court. In the latter court the Congregational church pleaded the general issue, and seven special pleas in bar, all of which set up as conclusive upon the appellant, and in bar of her application, a decree of the probate court made December 19, 1890, on the settlement and distribution of the estate of the testator.

The appellant joined issue on the general issue, and replied *precludi non* to the special pleas because she says that the property mentioned in her petition, consisting of both real and personal estate, has never been finally decreed to her, nor to the church, nor to any other person, or corporation, whatsoever, by the probate court, which alone has jurisdiction to make such decree, and that title to the property is uncertain. The replication was traversed, and the trial was by the court. On the trial, the court found that the decree of the probate court of December 19, 1890, and the portions of the will of Oliver Wells material to the issue, are correctly set forth in the third and fourth special pleas; that by that decree the appellant was given the use of the residue of the estate during her natural life, and that the fee of the residue was not thereby decreed to any one, nor has it been since then. On these findings the county court rendered judgment dismissing the petition of the appellant against her objection and exception. The material facts set

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forth in the pleas found to be true are that Oliver Wells deceased testate in 1887; that his will was duly probated; that by his will he gave the use of all his estate, first, to his wife, Rebecca Wells, during her natural life, secondly, at her decease, to his only daughter, the appellant, and the reversion to the heirs of her body; "and should my beloved daughter, Lucia R. Ward, die leaving no heirs of her body, or shall I, at any future time fail to have heirs of my body," then the real and personal property, constituting his estate, is given in fee simple to the Congregational church at Underhill Flats. This gift to the church has a condition in regard to its use by the church, and then the will proceeds: "The said church is not to have any interest in the aforesaid real estate and personal property until after the decease of my beloved wife, Rebecca Wells, and my beloved daughter, Lucia R. Ward; and is not then to have any interest in it, unless my said daughter dies leaving no heirs of her body." The pleas further set forth that after probating the will, and after the executor had rendered his final account and had it settled, and after finding both what estate was left and that Rebecca Wells had deceased, on due notice, and appearance of all parties interested, on December 19, 1890, the probate court, "pursuant to the last will and testament of the deceased, and the laws of this State," did decree to Lucia R. Ward, the petitioner, the use of the residue of the estate, during her natural life. This decree was not appealed from by any of the parties and is now in full force.

(1) The first contention is whether it precludes the petitioner from the relief sought through her petition.

December 19, 1890, the probate court had the subject matter, the estate of Oliver Wells, and the parties interested therein before it. It had full jurisdiction to determine, and it was its duty to determine correctly, the rights of the petitioner in and to the estate, and to make a decree thereof. If the devise to the Congregational church is now void under the law against perpetuities, it was so then. If the

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petitioner is now entitled to have the estate decreed to her in fee, she was so entitled then. Hence the identical subject matter brought before the probate court by this petition and all facts relevant thereto were then before it for determination and decree. By its decree she was given only a life estate, in the property, under adjudication. If she was then entitled to have that property decreed to her in fee, she was, by the decree, deprived of that right. A decree of the estate to her then or now in fee would operate to vacate and set aside the decree then made. A decree of the estate to her now in fee would collaterally attack and vacate the decree then made. It would cut the bond then placed around the property of the estate by which she could only enjoy its use, during her life, and give her title, dominion, and absolute control of the property. By that decree she was deprived of the enjoyment of the fee, dominion and absolute control of the property. Being deprived of a right in the property which she now claims, she could have appealed from the decree and had it corrected, if erroneous. The decrees of the probate court, made, in matters, and against parties, within the sphere of its jurisdiction, not appealed from, are conclusive upon those to whom the right of appeal is given. *Collard* v. *Crane*, Brayt. 18; *Judge of Probate* v. *Fillmore*, 1 D. Chip. 420; *Giddings* v. *Smith* 15 Vt. 344; *Lawrence* v. *Englesby*, 24 Vt. 42. Nor can such decrees be attacked, or impeached collaterally in the probate court, or in any other court. *Rix* v. *Smith*, 8 Vt. 365; *Lawrence* v. *Englesby*, 24 Vt. 42. *Driggs* v. *Abbott*, 27 Vt. 580; *Abbott* v. *Coburn*, 28 Vt. 663; *Richardson* v. *Merrill*, 32 Vt. 27; *Robinson* v. *Smift*, 3 Vt. 283; *Probate Court* v. *Vanduzer*, 13 Vt. 135.

The petition brought before the probate court no facts which were not before it when it made the decree of December 19, 1890. The same parties were then before the court which the petition brought before it. It has always been held, that the decisions of this court, on the same facts

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and between the same parties are conclusive, when the case comes a second time before the court. *Ross* v. *Bank of Burlington*, 1 Aik. 43; *Dana* v. *Nelson*, 1 Aik. 252; *Herrick* v. *Belknap*, 27 Vt. 673; *Stacy* v. *Vermont Cent. R. R. Co.*, 32 Vt. 551; *Barker* v. *Belknap's Est.*, 39 Vt. 168; *Childs* v. *Ins. Company*, 56 Vt. 609; *St. Johnsbury, etc., R. R. Co.* v. *Hunt*, 59 Vt. 94. This doctrine is applicable to the decrees of the probate court made within its jurisdiction. Nor is the result changed by the finding of the county court that no final decree, in regard to the fee of the property had been made by the probate court. By the terms of the will the time had not arrived when the probate court could determine in whom the fee of the property vested absolutely. That time will not arrive until the death of the petitioner. If then there exist heirs of her body the fee will be ascertained to be vested in such heirs. Although no persons now exist who would constitute heirs of the petitioner's body, the possibility of such heirs coming into existence is not precluded until the death of the petitioner. If no such heirs then exist, it will be for the probate court to determine whether the conditional executory devise to the Congregational church is void under the rule against perpetuities, and if so, to decree the property in fee to the heirs of the testator; and if not void, to decree it to the Congregational church under the provisions of the will. This is the scope of the decree of the probate court of December 19, 1890, and it is correct.

The terms of the devise to the petitioner create what, at common law, would be an estate in fee tail, (*Giddings and wife* v. *Smith*, 15 Vt. 344) which under V. S. 2201, and which before the statute, gave the petitioner a life estate only in the premises. *Giddings and wife* v. *Smith* was three times argued, carefully, and fully considered, and has ever since been followed. *Village of Brattleboro* v. *Mead*, 43 Vt. 556; *Thompson* v. *Carl*, 51 Vt. 408; *Doty and wife* v. *Chaplin*, 54 Vt. 361; *In re Kelso's Est.*, 69 Vt. 272. Hence the decree of December 19, 1890, was correct so far as

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concerns the petitioner. She has no interest in the question whether the contingent executory devise to the Congregational church is void or not. That question will never arise if she dies leaving heirs of her body. If she leaves no such heirs, at her decease, it will be a question between the then heirs of the testator and the Congregational church.

(2) But if there is any doubt in regard to the finality and correctness of that decree, the construction placed upon the will by the decree of December 19, 1890, gives effect to the intention of the testator. His intention is to be ascertained from a careful consideration of all the provisions of his will, read in the light of existing circumstances. By the will, the testator has provided, in very explicit terms, that, after the termination of the life estate therein given to his widow, a life estate shall be created in the property "to my only and beloved daughter" with remainder "to the heirs of her body." He then proceeds to say, "and should my beloved daughter, Lucia R. Ward, die, leaving no heirs of her body, or should I, at any future time fail to have heirs of my body, then it is a part of my will and testament" that the property in contention shall be the propety of the Congregational church, to be used for the purposes specified. If the words, "or should I, at any future time fail to have heirs of my body," had been omitted, it is not seriously contended that the devise over to the Congregational church would have been void for remoteness. The language used in the first clause, "die leaving no heirs of her body," import that the time when, if ever, the estate is to pass to the church is at the decease of the petitioner. If then she had an heir or heirs in the descending line, child or grandchild, living, such heir or heirs take the property and the church takes nothing. If, at that time, she left no such heir, the Congregational church takes the property. In such case, it is conceded that the devise over would not be defeated by reason of remoteness. But it is contended that the addition of the words, "or should I at any future time fail to have heirs of my

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body," creates such remoteness under the decision of *Village of Brattleboro* v. *Mead*, 43 Vt. 556, as to defeat the devise to the Congregational church.

In that case, and generally, it is held, that the intention of the testator in regard to the remotest time when the devise over shall take effect, determines whether such remotest time is within the rule against perpetuities; and that his intention in this respect is to be ascertained from all language of his will on the subject, read and construed in the light of existing, surrounding circumstances, independently of whether it will bring that time within, or without, the time limited by the rule against perpetuities. These circumstances existed when the testator made his will. The testator and his wife were well advanced in years. He had one only child, grown to womanhood and married. He expected his wife might outlive him, for he made provision for such a condition. Under these circumstances it is hardly reasonable to construe the language, "or should I, at any future time fail to have heirs of my body," as relating to any other such heirs than those who might thereafter exist in the line of his only married daughter. In creating the life estate to that daughter the remainder is "to the heirs of her body." He makes no devise to the heirs of his body in any other descending line. By his will he evidently intended to die testate in respect to all his property. But he devises a life estate to the daughter, and makes it take effect subsequently to the life estate which he has therein devised to his wife. It may have occurred to him, that his daughter might die leaving no heir of her body in his lifetime, or in the lifetime of her mother; or if she died leaving a child, the child might die during his life, or during the life of the grandmother; and he added these words to provide for such a contingency, but not thereby intending to defeat the conditional devise to the Congregational church, on the, to him, impossible supposition, that another line of heirs of his body than through his only married daughter might

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come into existence and need to be provided for. He did not attempt to provide for any such heirs. However, the two clauses of the will, already quoted, might be construed, if they were all the will contained on this subject, we think, the other provision of the will, on this subject, confines the testator's intention and meaning, in using the words in regard to the heirs of his body, to that we have given them. He evidently feared that if the petitioner should die childless during the continuance of the life estate of his wife, the devise over might cut short her life estate. For in a subsequent sentence he is careful to say, "The said church is not to have any interest in the aforesaid real estate and personal property until after the decease of my beloved wife, Rebecca Wells, and my beloved daughter, Lucia R. Ward, and is not then to have any interest in it unless my said daughter dies, leaving no heirs of her body." Here again he fixes the time when the devise to the church shall take effect as of the time when his daughter shall die, leaving no heirs of her body, if that shall ever happen, but in no event until the two life estates are terminated. Here he says nothing in regard to the failure of the heirs of his body, although he is endeavoring definitely to fix the time when the contingent remainder shall vest in the church, if ever. Neither does he speak of any other line of heirs coming to an end except that which shall descend through the petitioner.

This must be the construction to be placed upon this will. The will became operative and spoke as of the time of the testator's death. At that time the heirs of his body were determined. His only daughter, the petitioner, was such sole heir. No other such heirs could come into existence, certainly except through her. When, therefore, the testator, in his will, speaks of the heirs of his body, he designates the petitioner, and,—if any others,—such heirs as descend through her. When, in his will, he says "Or shall I, at any future time fail to have heirs of my body," he means his only daughter, or, at most, such, and only such, as may descend

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from her. Hence, when, in his will, he says, "And should my beloved daughter, Lucia R. Ward, die, leaving no heirs of her body, or shall I, at any future time fail to have heirs of my body," he speaks of only one line of heirs descending from his body; and, when he says that if this line of heirs does not exist at the death of this daughter, then the Congregational church shall take the property in fee, he fixes a time for the church to take, that is within the time limited by the rule against perpetuities. On the happening of the condition named, the devise over to the Congregational church will be ascertained to be operative and to have taken effect. Hence, considering all the provisions of the will, read in the light of existing circumstances, the remotest time at which the testator intended the contingent remainder devised to the church should vest and be determined to have vested, if it ever did, was at the termination of the life estate devised to the petitioner, if she outlived her mother, and came into it; but if the mother survived her, then upon the termination of the mother's life estate; dependent upon whether at such time there was then living one or more heirs of the body of the petitioner, and therefore heirs of the body of the testator. If such heir, or heirs, were then living, that fact would determine that the remainder or fee of the property had vested in them; otherwise in the Congregational church.

Judgment affirmed and ordered certified to the probate court.

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THE TOWN OF PAWLET *vs.* A. A. KELLEY, FRANK BLAKELY, et al.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Collector's Bond—Proof in Insolvency—Effect on Surety—Application of Payments.

There is no inconsistency in a creditor pursuing the principal and the surety at the same time, for both actions affirm the contract.

The plaintiff, by proving its claim in insolvency against its defaulting tax collector, did not bar itself from collecting the balance of his surety.

The debt having been created by the defalcation of the insolvent, he was not discharged, and if he was, his surety was not, by reason of V. S. 2140.

It is no defense for the surety that the rate bill included unpaid taxes of years before his suretyship, the surety being liable only for the amount of such taxes collected and not paid over.

The surety is liable for the non-payment of taxes collected even though the levy was invalid.

It is no defense for the surety that the selectmen changed the tax bills from time to time in the honest correction of their own and the listers' errors.

The surety cannot take advantage of the withdrawal of uncollected taxes from the hands of the collector, since he could not be harmed thereby.

The collector made an overpayment upon the taxes of 1892, and the mistake was not discovered until the hearing before the referee, when the collector requested its application upon the rate bills of 1893 and 1894, and the plaintiff requested its application upon delinquent taxes for 1891, for which the surety was not liable. It being apparent that the money was the proceeds of taxes for 1893, it was *held*, that it should be applied upon the deficit of that year, for, neither party having made the desired application at the time, the law will make it as justice requires.

It appearing that the taxes were legally assessed and the warrants duly issued and that the collector had received and withheld the amount stated by the referee, it will be presumed that the plaintiff paid the state and the state school tax to the proper authorities.

The exceptions of both parties being overruled, neither is to be allowed costs in this court.

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DEBT ON COLLECTOR'S BOND. Heard on the report of a referee, exceptions thereto by both parties and plaintiff's motion to recommit, at the March Term, 1897, Rutland County, *Tyler*, J., presiding. The court, *pro forma*, overruled the plaintiff's motion and exceptions and allowed the application of the overpayment upon the taxes of 1893, according to the direction of the collector, and sustained the defendant's exception and rendered judgment for the defendant, all as matter of law. The plaintiff excepted.

Fayette Potter and *G. E. Lawrence* for the plaintiff.

Butler & Moloney for the defendant.

The principal, and consequently the surety, was discharged by the election of the plaintiff to proceed in the court of insolvency. *Dearing* v. *Smith*, 66 Vt. 60; *International Tr. Co.* v. *W. Rutland Marble Co.*, 63 Vt. 331. The claim, though not a debt, was made such by the action of the plaintiff in proving it. V. S. 2138, 2139. The bond was waived. *Ames* v. *Dorset Marble Co.*, 64 Vt. 10. A discharge in bankruptcy of the principal discharges the surety. *Liddell* v. *Wiswell*, 59 Vt. 365. A judgment and extent against the collector bars an action on the bond. *Hartland* v. *Hackett*, 57 Vt. 92.

The tax collector was ineligible because he had not settled his account. V. S. 3058.

The sum stated by the referee improperly includes the unpaid highway taxes of 1891 and 1892. Their inclusion in the rate bill made it illegal. There was no authority for their collection. *Rowell* v. *Horton*, 57 Vt. 31.

The surety was released by the action of the selectmen in changing the tax bills. *Henry* v. *Chester*, 15 Vt. 460; *Barnes* v. *Ovitt*, 47 Vt. 316.

The surety was released by the withdrawal of uncollected tax bills, for this released the collector.

The surety is not liable, because if the collector was ineligible or the tax bill void, he had no right to collect the tax and is not liable for money illegally collected.

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The town has not shown that the illegal taxes were collected.

The overpayment should be applied as directed by the debtor. *Roakes* v. *Bailey*, 55 Vt. 542.

It was not shown that the town had ever been compelled to pay the state or the state school tax, and as to those taxes the bond is one of indemnity only. *Middlebury* v. *Nixon*, 1 Vt. 232; *Ferrisburgh* v. *Martin*, 60 Vt. 330.

The town treasurer should have notified the surety of the misappropriation. *Carpenter* v. *Corinth*, 62 Vt. 111.

TAFT, J. (1) The plaintiff town presented its claim against the insolvent estate of Kelley, the defaulting tax collector, and obtained a dividend thereon. The defendant Blakely, one of the sureties, who is defending this suit, insists that the town has thus chosen one of two inconsistent remedies and for that reason it cannot now pursue him as he was thereby discharged, citing *Hartland* v. *Hackett*, 57 Vt. 92; *White* v. *White*, 68 Vt. 162. There is no question concerning the rule. If a creditor has two remedies, inconsistent with each other, he has his election which to pursue, and if he adopts one, he is barred from pursuing the other. He cannot affirm a contract, and at the same rescind it for fraud or other reasons. If he has the right to enforce his contract by action of contract, or upon a rescission of the contract to maintain an action of tort for fraud, if he obtains judgment in contract, he waives the fraud. *Palmer* v. *Preston*, 45 Vt. 154. The court in *Hartland* v. *Hackett*, *supra*, may have erred in holding the remedies inconsistent, or it may have placed its decision upon the ground that the imprisonment of the debtor, was a *quasi* satisfaction of the debt. There is nothing inconsistent in a creditor pursuing the principal and the surety at the same time, both actions being based upon an affirmation of the contract. He may pursue both until he obtains satisfaction of his debt. This point is not well taken.

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In connection with it, it is further urged that the discharge of Kelley was a discharge of the surety, Blakely. The debt presented by the plaintiff against the insolvent estate of Kelley, was one created by the defalcation of the latter as a public officer, a tax collector, and from this debt, Kelley was not discharged. V. S. 2139. If he was, the defendant Blakely was not. V. S. 2140.

(2). It is objected that the defendant Blakely cannot be holden, for that Kelley was ineligible to reelection in 1893 and 1894, under V. S. 3058, which forbids the reelection of a constable who refuses or neglects on or before the first day of March in each year, "to pay over all moneys collected by him to the treasury to which they belong, and settle his accounts with the treasurers." It does not appear that at the time of the settlements in 1893 and 1894, there were any moneys in Kelley's hands not paid over, and he settled his accounts each year with the treasurer. The referee reports that certain amounts of the taxes were *uncollected, or not paid over*, it does not appear which. If they were *uncollected*, there was no prohibition upon his reelection. If the election was in violation of the statute, whether it would bar a recovery in this action, we do not pass upon, as it is unnecessary.

(3) It is no defense herein that the selectmen included the unpaid highway taxes of 1891 and 1892 in the tax bill for 1893. If the taxpayer paid Kelley the amount of the tax, the money became the money of the town, and the surety liable if the collector did not pay it over. If the tax levy was invalid, it was no defense as to the non-payment of the moneys in fact collected. *Tunbridge* v. *Smith*, 48 Vt. 648.

(4) It is objected that the selectmen changed the tax bills from time to time, and that the sureties should not be held liable for the mistakes of, and changes by, the plaintiff's officials. The changes made as shown by the report, were corrections of errors in footings, and in other respects, and adding some taxes which had been omitted by the listers.

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Accidental errors, and defects made in good faith, do not render a list void, as a basis of taxation. *Spear* v. *Braintree*, 24 Vt. 414.

(5) The surety was not harmed by the withdrawal of the uncollected taxes in the hands of the collector, in the spring of 1895. It prevented any increase in the amount of defalcation.

(6) The objection under this point is based upon assumed facts, viz: that the collector was ineligible, a void tax, and no proper assessment, and is not tenable, and

(7) for the same reasons, point seven in the brief for the defendant, assuming there was no proper assessment, was not well taken.

(8) Kelley during the year 1893, paid the defendant's treasurer, by mistake, to apply on taxes of 1892, the sum of $529.27, in excess of the sum due. The error was not discovered until the hearing in this case before the referee, when the collector requested its application upon the rate bills of 1893 and 1894, and the plaintiff upon delinquent taxes for 1891, for which the defendant Blakely was not liable. The current of decisions in this State is, that when neither party makes an application of a payment, the law will make such an application as it deems just and equitable. *Pierce* v. *Knight*, 31 Vt. 701. It is apparent that the money so applied by mistake upon the taxes of 1892, was the proceeds of the taxes for the year 1893, and it is just and equitable that that sum should be applied upon the deficit of that year. This exception of the plaintiff is not sustained.

(9) It fairly appears from the report of the referee, that the taxes were legally assessed, the warrants duly issued, and that Kelley collected and withheld the amount shown by the referee's report, and it will be presumed that the plaintiff paid the state and the state school tax to the proper authorities. There is nothing included in the report of the referee, save money collected by Kelley, and not paid

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over, and by the judgment the defendant is not made liable for anything for the reason of non-collection of taxes, and nothing appears in the case which made it the duty of the town treasurer to notify the surety of any misapplication of the funds of the town, or that he had paid any funds to the town without making an application thereof. This disposes of all questions made by the defendant;

The pro forma judgment is reversed, and judgment rendered for the plaintiff for the amount shown due by the report with interest since the bringing of the suit. The exceptions of both parties being overruled neither is allowed costs in this court.

STATE *vs.* ADDIE SHATTUCK.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, START and THOMPSON, JJ.

Adultery—Out-of-State Marriage—Statute Forbidding Remarriage.

The guilty party to a decree of divorce, forbidden by our statute to remarry, may nevertheless remarry in New Hampshire, the laws of that state permitting, and the marriage will be recognized here, although both parties to the new marriage were all the while domiciled in this State.

The presumption is that the common law of a sister state is the same as our own, and statutes in restraint of marriage being exceptional, their existence is not to be presumed.

INFORMATION for adultery. Plea, not guilty. Trial by jury at the December Term, 1896, Windsor County, *Munson*, J., presiding. Verdict, guilty. Judgment, sentence and execution thereon at request of the respondent without waiving exceptions. The respondent excepted.

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W. B. C. Stickney for the respondent.

It was for the State to show that Coburn was competent to marry by the laws of New Hampshire. It was an essential fact, and there is no presumption. *Taylor* v. *Boardman*, 25 Vt. 581, 586. As to the law of New Hampshire, see *True* v. *Ranney*, 21 N. H. 52: 53 Am. Dec. 164; *Emerson* v. *Shaw*, 56 N. H. 418.

The New Hampshire marriage was illegal in Vermont. V. S. 2703, 2704, 5056. The statute does not limit the disqualification. The correct principle is, that if a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state, in which the marriage is not prohibited, to celebrate a marriage forbidden in their own state, and immediately returning to their own state to insist on their marriage being recognized as lawful. *Brook* v. *Brook*, 9 H. L. Cas. 219; *Pennegar* v. *State*, 87 Tenn. 244: 2 L. R. A. 703; *Barney* v. *Cuness*, 68 Vt. 51.

J. G. Harvey, State's Attorney, and *W. W. Stickney*, for the State.

A marriage, valid where it is contracted, is valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage void or the marriage is deemed contrary to the law of nature. II Kent, Com. 91; *Com.* v. *Graham*, 157 Mass. 73; *Putnam* v. *Putnam*, 8 Pick. 433; *Thorp* v. *Thorp*, 90 N. Y. 602; *Roberts* v. *Railroad Co.*, 34 Hun. 324; *Dickson* v. *Dickson*, 1 Yerg. 110: 24 Am. Dec. 444; *West Cambridge* v. *Lexington*, 1 Pick. 505: 11 Am. Dec. 231; *Sutton* v. *Warren*, 10 Met. 451; *Stevenson* v. *Gray*, 17 B. Mon. 193; *Dannelli* v. *Dannelli*, 4 Bush. 61; *Van Storch* v. *Griffin*, 71 Pa. 240; *Medway* v. *Needham*, 16 Mass. 157: 8 Am. Dec. 131; *Phillips* v. *Gregg*, 10 Watts. 158: 36 Am. Dec. 158; *State* v. *Patterson*, 2 Ired. 346: 38

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Am. Dec. 699; *VanVoorhis* v. *Brintnall*, 86 N. Y. 18: 40 Am. Rep. 505; *Moore* v. *Hegeman*, 92 N. Y. 521: 44 Am. Rep. 408.

The Vermont statute contains no express prohibition of such a marriage as this, and *Ovitt* v. *Smith*, 68 Vt. 35, where the marriage was celebrated in this State, has no application. V. S. 2703, 2704.

ROWELL, J. The charge is that the prisoner, an unmarried woman, committed adultery with Coburn, a married man.

It appeared that Coburn's first wife, who is still living, obtained a divorcc from him in this State in December, 1895; that on June 13, 1896, he and Grace Hoisington, both of whom were then domiciled in Windsor, in this State, went to Claremont, New Hampshire, and were there married by a clergyman authorized by the law of that state to solemnize marriages; and that immediately after the marriage they returned to Windsor, where they have lived ever since, and where they first cohabited as husband and wife, never having cohabited as such in New Hampshire.

The only evidence of the law of New Hampshire respecting marriages was chapter 174 of the Public Statutes of that state, entitled, "Marriages." That chapter imposes no restraint upon remarriage by the guilty party to a decree of divorce.

The court charged the jury that if it found that the marriage ceremony was performed by the clergyman, and that he was authorized to perform it, as his testimony tended to show, and also found that the said Grace cohabited with Coburn under the belief that the marriage was legal, as her testimony tended to show,—the marriage was valid, and Coburn was a person with whom the crime of adultery could have been committed. To this the prisoner excepted; and also, for that the court did not charge that there was no evidence in the case to show that Coburn, being disqualified by the laws of this State to

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contract a lawful marriage, was, notwithstanding such disqualification, competent by the laws of New Hampshire to contract a lawful marriage, and that without such testimony, the fact of his marriage to said Grace was not made out.

This last exception is not sustainable. As we have said, the chapter of the New Hampshire statutes put in evidence is not restrictive in this behalf; and if it be said that some other part of the statutes may be, the answer is, that as such restrictions upon marriage are exceptional, the burden was on the prisoner to show the restriction, if any there is. *Hutchins* v. *Kimmell*, 31 Mich. 126, 132. And as no such restriction exists in the common law of this State, the presumption is that the common law of New Hampshire is like ours in this regard. *Ward & Co.* v. *Morrison*, 25 Vt. 593, 601.

The marriage in question must, therefore, be taken to be valid by the law of New Hampshire. But had it been celebrated in this State, it would been void here, for our statute provides that it shall not be lawful for a divorced libellee to marry a person other than the libellant for three years from the time the divorce is granted, unless the libellant dies, and imposes a penalty on a person who violates that provision, or lives in this State under a marriage relation forbidden by it; and we have recently held that a marriage celebration in this State in violation thereof, between parties domiciled here, was void here. *Ovitt* v. *Smith*, 68 Vt. 35.

The prisoner claims that this marriage is void here notwithstanding it was celebrated in New Hampshire and is valid there, for that when a marriage is absolutely prohibited in a state or country as being contrary to public policy and leading to social evils, the domiciled inhabitants of that state or country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden in their

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own state, and immediately return to their own state, to insist on their marriage being recognized as lawful.

It is the common law of Christendom, that as to form and ceremony, a marriage good where celebrated is good everywhere. But as to capacity to marry, the authorities are not agreed, some holding that, as in other contracts, it depends upon the law of domicil, and some, that it depends upon the law of the place where the marriage is solemnized, as do form and ceremony, and that a marriage good where celebrated is good everywhere, unless odious by the common consent of nations, or positively prohibited by the public law of a country from motives of policy. It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and with an intention of returning to reside there, go into another state or country and are married, and afterwards return and reside in Massachusetts, the marriage shall be deemed void.

We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state just as though the statute did not exist. If they are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question,

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if such international law is a part of the law of the state, as it is here, for a written law not construed to be extra-territorial does not change the unwritten law as to extra-territorial marriages; and therefore parties who are under no disability by international law, may choose their place of marriage, and if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicil would not have made them married. There is, therefore, no foundation for an argument based simply on the idea of an evasion of the law of domicil.

This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extra-territorial, unless made so by express words or necessary implication, as has been frequently held in this country, though there are cases the other way, among which is the recent and well-considered case of *Pennegar and Haney* v. *The State*, 87 Tenn. 244, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the proposition stated.

This whole subject is very fully and satisfactorily discussed by Mr. Bishop in chapter 39 of the first volume of his work on Marriage, Divorce, and Separation; and as we adopt his views, an extended discussion here is not necessary. The subject is also fully discussed in *Commonwealth* v. *Lane*, 113 Mass. 458, and *Ross* v. *Ross*, 129 Mass. 243. In the latter case it is said that the relation of husband and wife being based upon the contract of the parties and recognized by all Christian nations, the validity of the contract, if not polygamous nor incestuous according to the general opinion of Christendom, is governed, even as regards the capacity of the parties, by the law of the place of marriage; that this status, once legally created, should be recognized everywhere as fully as if created by the law of the domicil; and that therefore such a marriage, if valid by the law of the place

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where contracted, even if contracted between persons domiciled in Massachusetts and incompetent to marry there, is valid there to all intents and effects, civil and criminal, except so far as the legislature has clearly declared that such a marriage out of the Commonwealth shall be deemed invalid.

The same doctrine is held in *VanVoorhis* v. *Brintnall*, 86 N. Y. 18, where it is said that in the absence of express words to that effect, it is not to be inferred that the legislature intended its enactments to contravene the *jus gentium* under which the question of the validity of the marriage contract is referred to the *lex loci contractus*, and which is made binding by the consent of all nations, and professedly and directly operates upon all, and that, while every country can regulate the status of its own citizens, until the will of the state finds clear and unmistakable expression to the contrary, that law must control. Judge Marshall says in *United States* v. *Fisher*, 2 Cranch, 389, that "Where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the legislative intent must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

Brook v. *Brook*, 9 H. L. Cas, 193, sustains the prisoner's contention. There a man and his deceased wife's sister, both of whom were lawfully domiciled British subjects, went temporarily to Denmark and were there married, where their marriage was valid; but it was held void in England, because an English statute prohibited such marriages. The law Lords delivered separate opinions, and the only ground upon which they agreed was, that as the statute made such marriages between English subjects domiciled in England void because declared by the act to be contrary to the law of God, it must be construed to include such marriages though solemnized abroad. Judge *Gray* says in *Commonwealth* v. *Lane*, above cited, that the

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judgment in that case proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and that the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

Mr. Bishop criticises the case very sharply, and says it is of the highest importance that it be sufficiently understood in this country to avoid any accident of its being followed by our courts. He discusses it very fully, admitting that it was difficult for him to write soberly about it, as the decision was announced in apparent oblivion of the course that justice had taken for ages in England, and ignored alike acts of Parliament and judicial decisions. To follow it, he says, would lead us into a confusion not to be endured where marriage, good order, and Christian decency are respected.

The French law is much like the English in this regard, though more exacting. By the *Code Napoleon*, a marriage contracted in a foreign country between French people, or between a French person and an alien, is valid if it has been celebrated in the manner followed in such country, provided it has been preceded by the publication required by the *Code*, and provided the French person has not violated the provisions of the *Code* concerning the qualifications and conditions required to contract marriage. Cachard's French *Civil Code*, Art. 170.

This accords with the further provision of the *Code*, that laws relating to the status and capacity of persons apply to Frenchmen even resident in a foreign country. Ib. Art. 3. On this principle the civilians generally, we think, hold that as to capacity to marry, the law of the domicil governs.

But the other view, as suggested by Judge *Story*, is founded upon a more liberal basis of international policy that

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deems it far better to support as valid mariages celebrated in another state or country when in conformity with the laws thereof, although some minor inconveniences may arise therefrom, than to shake general confidence in such marriages, to subject the innocent issue to constant doubts as to their legitimacy, and to leave the parties themselves at liberty to cut adrift from their solemn obligations whenever they happen to become dissatisfied with their lot. Conf. of Laws, pl. 124.

Judgment that there is no error in the proceedings of the county court, and that the prisoner take nothing by her exceptions.

STATE *vs.* E. G. STEVENS.

January Term, 1897.

Present: TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Set-Line—Judicial Knowledge—V. S. 4592.

The construction of a statute involving the meaning of words used therein, is not a question of fact, but of law.

If a word used in a statute is technical, it is for the court to inform itself of its meaning by inquiry of experts or reference to books or documents, or by any other means deemed advisable.

A common fishing line, with one hook attached, fastened to some object on shore, is not a set-line within the meaning of V. S. 4592.

INDICTMENT for using a set-line, under V. S. 4592. Plea, not guilty. Trial by jury at the September Term, 1896, Orleans County, *Ross*, C. J., presiding. Verdict, guilty, and sentence. The respondent excepted.

Upon trial the respondent offered to show, as matter of fact by witnesses and by dictionary definitions that the lines

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used were not set-lines and excepted to the ruling of the court excluding the evidence. At the close of the testimony he moved for a verdict in his favor and excepted to the denial of his motion. He also excepted to the charge that the lines described by the State's evidence were set-lines.

B. F. D. Carpenter and *E. A. Cook* for the respondent.

"Set-line" is a technical term and means a line from which shorter lines, with hooks attached, are suspended, well calculated for the wholesale slaughter of fish. The lines used by the respondent were not such but were rather "tended" lines. V. S. 4583.

The offered evidence should have been received. It was proper to be considered by the jury, if not by the court. I Green. Ev. (13 ed.) 324, 333.

O. S. Annis, State's Attorney, for the State.

It was for the court to say what constituted a set-line. Bish., Stat. Cr. (2 ed.) § 71.

The motion for a verdict was properly overruled and the jury were properly instructed, for the lines used were set-lines. V. S. 4592; *Adams* v. *Sleeper*, 64 Vt. 544; Endlich, Interp. St. § 252; *Lau Ow Bew* v. *U. S.*, 144 U. S. 47.

TAFT, J. The respondent was indicted under V. S. § 4592 which provides that if a person use or furnish for use for fishing, a set-line in the waters of this State, he shall be fined. The respondent is charged with using for fishing a set-line in Willoughby Lake in Westmore in May, 1896. The facts shown upon trial in reference to the acts of the respondent were not disputed. He was fishing in the lake and had five lines extended into the waters with one hook upon each, the lines being fastened to some object upon the bank of the lake.

The case turns upon the construction and meaning of the term "set-line" as used in the statute. The question presented is, was the court correct in holding that the lines in question were set-lines?

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The construction of a statute involving the meaning of words used therein is not a question of fact, but one of law.

What was meant by the term "set-line" as used in the statute was a question for the court. There is no statutory definition of it.

If a word in a statute is of common import the court may understand it without further knowledge, but if the word is not of common use or has a technical meaning the judge may refer to persons who have knowledge upon the subject, or consult documents or books of reference containing information thereon. If the terms are words of art and science, their meaning may be found by consulting experts in such art and science. In fact the trial judge may take such means as he deems advisable to inform himself upon the subject and enable him to give in his instructions to the jury the proper construction and definition of the words used in the statute.

Did the court err in holding the lines were set-lines?

Writers upon the subject of fishing state that a "set-line" is "a line with baited hooks fastened to it set or anchored for taking fish," Stan. Dic. 1638; and "a line to which a number of baited hooks are attached and which, supported by a buoy, is extended on the surface of the water." 4 Encyc. Dic., 4216. And further, "fishing lines may be classed as hand lines and set-lines, long lines or trawls. These three names are applied to long lines having attached to them at regular intervals lines armed with hooks. At either end is an anchor to hold the trawl in place, furnished also with a line and buoy to indicate its position." 3 Johns. Univ. Cyc., 390.

In describing fisheries in 9 Encyc. Brit. 256, an instance is given of a set-line about eight miles long with four thousand six hundred and eighty hooks attached.

The statute not only forbids the *use* for fishing of pound-nets, trap-nets, seines, gill-nets, set-nets, fykes, set-lines and fishing otters or trawls, but prohibits the *furnishing* of

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them for that purpose. Hence if a man has one of these things he cannot loan it to a neighbor for such use. Each of these articles is a specific thing; the name designates what it is. It is fairly inferable from this language that the term "set-line" denotes a fishing line of a certain kind, or species, its character not depending upon the manner of its use, and not a common fishing line with one hook attached, which becomes a "set-line" if tied to some object on the shore.

The language of V. S. § 4583, countenances this construction of the statute, for by that section a penalty is imposed upon certain fishing, except fishing through the ice with not more than fifteen tended lines. This would indicate that a line with a single hook fastened to any object upon the banks or upon the ice, such a line as the respondent was using, is what is meant as a tended line and not a set-line.

The ruling should have been that the lines were not set-lines.

Exceptions sustained, judgment and sentence reversed and cause remanded.

SUSAN B. SOWLES *vs.* ANTHONY CARR.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and START, JJ.

Ejectment—Surrender—Burden of Proof—Presumption of Continuance—Evidence.

In ejectment, the burden is on the plaintiff to prove the defendant in possession when the action was brought; but where he is shown in possession under a perpetual lease at an earlier date, the presumption of continuance arises, and if he claims to have surrendered possession to the plaintiff, it is for him to prove it.

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To make out the surrender, he must show an acceptance by the plaintiff.

A witness for the plaintiff having produced a memorandum which he claimed to have made at the time of the occurence, it was proper for the defendant to show that at a former trial he had produced a different paper as the original, and to show what it contained.

A motion to set aside a verdict as against the weight of evidence is addressed to the discretion of the trial court, whose decision thereon is not revisable here.

EJECTMENT to recover the possession and rent of premises leased to the defendant. Plea, not guilty and disclaimer. Trial by jury at the September Term, 1895, Franklin County, *Munson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

Albert Sowles, a witness for the plaintiff, having produced a memorandum which he claimed to have made at the time of the occurrence, Mr. Arthur, a witness for the defendant, was allowed to testify that at a former trial Mr. Sowles had produced a different paper as the original memorandum and to describe it and state its contents.

E. A. Sowles for the plaintiff.

C. G. Austin for the defendant.

ROWELL, J. The plaintiff could not recover without showing that the defendant was in possession when suit was brought, which was in June, 1894. It appeared that on February 1, 1883, the defendant took a perpetual lease of the demanded premises and then went into possession thereunder, and remained in possession and actual occupancy until the fall of 1893; but he claimed, and the testimony on his part tended to show, that between that time and the commencement of the suit, he surrendered possession to the plaintiff with her consent, and that she accepted and received possession at his hands, which she denied.

The court correctly charged that the defendant could not rid himself of possession by abandoning the premises without acceptance of possession by the plaintiff and

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that the burden was on the plaintiff to show that the defendant was in possession when the suit was brought; but it erroneously charged that this covered the point that there had been no surrender of possession, and that the burden was on the plaintiff to show that there had not been, for it contravened the rule in respect to the presumption of the continuance of existing conditions. Mr. Wharton says that when a party establishes a judicial relation not in itself so limited in time as to have terminated at the period of litigation, it is not necessary for him to prove the continuance of the relation, but that the burden is on the other party to prove that it has terminated. II Whart. Ev. § 1284.

There are many cases illustrative of this rule. Thus, I prove that a debt was due to me a year ago; the burden is on the debtor to show that it is paid or otherwise discharged. *Farr* v. *Payne*, 40 Vt. 615. Where the defendants relied on the statute of limitations, the plaintiff proved that they resided out of the State when the cause of action accrued; held, that it must be presumed that they continued thus to reside, and that the burden was on them to show that they did not. *Rixford* v. *Miller*, 49 Vt. 319.

The fact that a man was a professional gambler twenty months ago, is presumptive evidence that he is such now. *McMahon* v. *Harrison*, 6 N. Y. 443.

So when possession is admitted or proved, whether of real or personal property, we may infer as a presumption of fact, for the purpose of determining where the burden of proof lies, that the possession is continuous. II Whart. Ev. § 1286. Thus, A was in actual possession of land in March, claiming title. It will be presumed that he was in such possession in May following, when ejectment was brought against him, unless he shows that he had abandoned possession. *Chilson* v. *Buttolph*, 12 Vt. 231. So if the seisin of a party is proved, the presumption is that it continues, and the burden is on him who alleges a disseisin;

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and that burden does not shift, but remains upon him, even after he has given *prima facia* evidence of a disseisin. *Brown* v. *King*, 5 Met. 173. So occupancy under a disseisor will, in the absence of evidence to the contrary, be presumed to continue under his heirs. *Currier* v. *Gale*, 9 Allen 522. And see cases collected in a note on this subject, 12 L. R. A. 620.

The plaintiff excepted to the refusal of the court to charge as requested concerning the right of the defendant to surrender. But we think those requests were sufficiently complied with when the court told the jury that there could be no surrender without the consent and acceptance of the plaintiff. With such consent and acceptance, there certainly could be a surrender of possession that would defeat this action.

The testimony of Mr. Austin was admissible, as it was in rebuttal of material testimony given by Mr. Sowles.

The motion to set aside the verdict as against the weight of evidence was addressed to the discretion of the trial court, and therefore its decision overruling it is not revisable here. *Newton* v. *Brown*, 49 Vt. 16; *Stearn* v. *Clifford*, 62 Vt. 92.

Reversed and remanded.

JOHN R. PRIEST, admr. *vs.* FOSTER & JAQUITH.

January Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Estoppel—Election of Remedies—Contract to Return Property—Loss by Fire.

One who mistakenly supposes himself to have two remedies and chooses the wrong one, is not thereby barred from prosecuting the right one. Election is the choice between two available, inconsistent remedies.

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A party is not estopped from proving a fact by a former judgment against him unless the precise point was there adjudicated.

The plaintiff first sued the defendants in case for so negligently managing his mill that it was destroyed by fire, and in that suit was cast. He then sued the defendants for a breach of their contract to return the mill as they received it. *Held*, that the judgment in the first action was not conclusive of the terms of the contract upon which the mill was let nor any bar to the maintenance of the second action.

If one contracts to return property in as good condition as when he receives it, he is liable for the destruction of the property by fire or other accident.

SPECIAL ASSUMPSIT. Plea, the general issue with notice. Trial by jury at the September Term, 1896, Rutland County, *Rowell*, J , presiding. Verdict and judgment for the plaintiff. The defendants excepted.

The defendants claimed that the plaintiff was barred from the present action by reason of having prosecuted the former to final judgment, and objected to all evidence. The court ruled that the remedies were not inconsistent and admitted the evidence, to which the defendants excepted.

The defendants further claimed that the contract of letting had been determined in the former suit and objected to the plaintiff's evidence upon that subject; but the evidence was admitted and the defendants excepted.

W. W. Stickney and *J. G. Sargent* for the defendants.

The two remedies were inconsistent and the plaintiff having elected the first was barred from the second. *Hartland* v. *Hackett*, 57 Vt. 92; *White* v. *White*, 68 Vt. 161; *Norton* v. *Doherty*, 3 Gray 372; *Smith* v. *Way*, 9 Allen 472; *Moller* v. *Tuska*, 87 N. Y. 166; *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450: 10 Am. St. 479.

The former judgment was conclusive as to the terms of the lease. *Blodgett* v. *Jordan*, 6 Vt. 580; *Perkins* v. *Walker*, 19 Vt. 144; *Spencer* v. *Dearth*, 43 Vt. 98; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Wilson's Exrs.* v. *Deen*, 121 U. S. 525; *Johnson Co.* v. *Wharton*, 152 U. S. 252.

The contract did not amount to an agreement to rebuild.

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I Taylor, Land. and Ten., 421; *Warner* v. *Hitchins*, 5 Barb. 666; *Miller* v. *Morris*, 55 Tex. 412: 40 Am. Rep. 814; *Warren* v. *Wagner*, 75 Ala. 188: 51 Am. Rep. 446.

Butler & Moloney for the plaintiff.

The two remedies were not inconsistent but concurrent. *Johnson* v. *Worden*, 47 Vt. 457; *Darling* v. *Woodward*, 54 Vt. 101; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Bank* v. *Taylor*, 66 Vt. 578.

An express agreement to return in good repair makes the tenant liable to rebuild. Wood, Land and Ten., §§ 369, 373; *Phillips* v. *Stevens*, 16 Mass. 238; *Tilden* v. *Tilden*, 13 Gray 103; *David* v. *Ryan*, 47 Iowa 642.

START, J. The plaintiff obtained judgment in the court below for damages that had accrued to him by reason of the defendants' breach of contract to repair, keep in repair and return in as good condition as when they took it, a certain mill and machinery therein. While the defendants were in the occupancy of the mill under this contract, it was destroyed by fire. Thereupon the plaintiff brought a suit against the defendants, declaring in case, and thereby charged, that, while the defendants were in the occupancy of the mill, it became their duty to manage and use the mill and premises in a careful and prudent manner, so that the same might not be injured and destroyed; that the defendants, not regarding their duty, were careless and negligent in the management of the property, by putting upon the premises a boiler and smoke-stack and running and operating the same and neglecting to keep the property insured for the benefit of the plaintiff, and by wholly neglecting to care for the property so that it might not be destroyed; and that, by reason of the carelessness and negligence aforesaid, the property was wholly destroyed. To this declaration the defendants pleaded not guilty; and the cause was heard by a referee, who failed to find that the fire was caused by the negligence of the defendants, or that

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the defendants agreed to keep the property insured for the benefit of the plaintiff, and so reported, but did find, that, by the terms of the contract under which the defendants went into possession of the mill and machinery, they were to take the property as it was and leave it as good as they found it. After the report had been filed in court, the plaintiff asked leave to file an amended declaration, setting forth, among other things, the defendants' agreement to leave the property as good as they found it, and that they had not done so. The court held that the proposed amendment was for a different cause of action from that set forth in the original declaration, denied the plaintiff's motion, and rendered judgment on the report for the defendants.

The defendants claim that the judgment in the first suit is conclusive as to the terms of the contract under which they took possession of the property, and that its terms were not open to dispute in the present suit. The terms of the original contract were not put in issue by the pleadings in the former suit; and the court refused to allow an amendment that would put the defendants' liability under the contract in issue, because the same was for a different cause of action from that declared upon in the original declaration, and thereby held that the defendants' liability, under their contract to return the property, could not be litigated in that action. This holding is conclusive upon the question of whether the defendants' liability under the contract was in issue, or determined; and the plaintiff is not concluded by the finding of the referee upon an issue not made by the pleadings, which was not, and could not, be litigated in that action. In order to estop a party from proving a fact, because the fact has been found against him in a former suit, it must clearly appear that the precise question was adjudicated in such suit; and, if the record relied upon leave this in doubt, there is no estoppel. *Aiken* v. *Peck*, 22 Vt. 255; *Tarbell* v. *Tarbell*, 57 Vt. 492; *Gray* v.

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Pingry, 17 Vt. 419; *Gilbert* v. *Thompson*, 9 Cush. 348; *Russell* v. *Place*, 94 U. S. 606.

The more important inquiry is, whether the plaintiff, by attempting to charge the defendants with the loss of the property, in an action of tort, on the ground that the damage was caused by the defendants' negligence, and failing in such action, is precluded from resorting to the present action to recover the damage he has sustained by reason of a breach of the defendants' contract to repair, keep in repair and return the property in as good condition as when they took it. To constitute the defense of a waiver by election of remedies, the remedies must be inconsistent, as where one action is founded on an affirmance, and the other upon a disaffirmance of a contract. Where two remedies are consistent, so that resort to one is not a disaffirmance of the other, either or both may be prosecuted until satisfaction is obtained. There are numerous authorities in support of this holding. Thus, in *Merchants National Bank* v. *Taylor*, 66 Vt. 574, the defendant, by false and fraudulent representations in respect to his farm being free from incumbrance, induced the plaintiff to surrender to him certain trade paper and take in lieu thereof his note, secured by mortgage upon his farm. It was held, that the plaintiff had two causes of action, one in contract upon the note, and the other in tort for the false representations; that the plaintiff might prosecute either or both of these causes of action to a recovery; that both proceeded on the theory of affirming the contract; and that one did not allege what the other denied.

In *Johnson* v. *Worden*, 47 Vt. 457, it is held, that a conditional vendor of personal property does not lose his lien upon the property by proving the sum due upon the contract of sale against the vendee's estate in insolvency; and that, after such proof, he may maintain an action against the vendee for its conversion. In the opinion it is said: "When he proved the debt for the oxen, he was

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pursuing that one of his remedies, and could do so without losing the other, until his right to his pay for the oxen should be fully satisfied. Not having been paid in that way, he had the right to pursue the other remedy." In *Root* v. *Lord*, 23 Vt. 568, the holding is to the same effect. In *Powell* v. *Dayton R. R. Co.*, 16 Oregon 33: 8 Am. St. 251, it is held that an election to sue on a contract to purchase real property, will not preclude the plaintiff from suing for damages for waste committed on the same property by the defendant while a lessee thereof, if the plaintiff had no cause of action, and failed in the first suit because the defendant had not elected to purchase the property. In *Connihan* v. *Thompson*, 111 Mass. 270, it is held that a purchaser of land is not estopped from maintaining a bill in equity for specific performance of the contract to sell, by reason of his having sued the seller at law for breach of the contract. In the course of the opinion, it is said: "The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract, or sale of property."

Where the remedies are consistent and concurrent, the party may prosecute as many remedies as he has. *Bowen* v. *Mandeville*, 95 N. Y. 237. The rule requiring a choice of remedies is applicable only when the remedies available are inconsistent. *Black* v. *Miller*, 75 Mich. 323. Election exists when a party has two alternative and inconsistent rights, and is determined by a manifestation of choice; but the fact that a party wrongly supposed he had two such rights, and attempted to choose the one to which he was not entitled, is not enough to prevent his exercising the other, if entitled to it. *Snow* v. *Alley*, 156 Mass. 193. In the case last cited the plaintiff had brought an action to recover the value of certain bonds, on the ground that he could repudiate the contract because of the defendant's bad faith, but recovered for only a part of them; and it was held

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that the alleged breach of the defendant's promise was left untouched, and was the proper subject of an independent action. A recovery in an action for the hire of personal property, is no bar to another action seeking to obtain damages for injuries done to the property while in the hands of the bailee. *Shaw* v. *Beers*, 25 Ala. 449. It was held in *Morgan* v. *Skidmore*, 55 Barb. 263, and affirmed in court of appeals, that an action of tort can be maintained against a person for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment had been obtained against the firm, including himself, for the price of the goods, sold on credit to the firm by the plaintiff in consequence of such misrepresentations. An unsuccessful attempt to claim a right, or pursue a remedy, to which a party is not entitled, will not deprive him of the benefit of that to which he is entitled. *Re Van Norman*, 41 Minn. 494. A party who imagines he has two or more remedies, or who misconceives his right, is not to be deprived of all remedy because he first tries the wrong one. *Bunch* v. *Grave*, 111 Ind. 351. So where a party, in ignorance of his rights, resorts to a supposed remedy and fails, he is not concluded from resorting to the remedy he in fact had. *Butler* v. *Hildreth*, 5 Met. 52; *Dash* v. *Van Kleeck*, 7 Johns. 477: 5 Am. Dec. 297. In some cases, it is said that a party is estoppel by an election of remedies, where both actions must be supported by the same evidence. Thus, in *Marsh* v. *Pier*, 4 Rawle 273: 26 Am. Dec. 131, it is held, that judgment estoppel arises when the evidence in support of the present and former actions must be the same, though the actions are grounded on different writs; and, in *Smith* v. *Whiting*, 11 Mass. 445, it is held that a second action cannot be maintained upon evidence once offered and rejected in a trial of a like action, between the same parties.

The issues made by the pleadings in the two cases are dissimilar, and are supported by entirely different evidence. In the former case, the issue was whether the loss complained

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of was caused by the defendants' negligence, and was supported by evidence of the defendants' acts and omissions. In the latter case the issue was whether the defendants agreed to keep the property in good repair and return it in as good condition as it was when they took it, and whether there was a breach of this agreement, and was supported by evidence tending to show the contract under which the defendants took the property, and their failure to return it. If the loss of the property had been caused by the defendants' negligence, the plaintiff would have had two remedies, one in tort counting on the defendants' negligence, and the other on the defendants' contract to keep the property in good repair and return it in as good condition as it was when they took it. The plaintiff by his action in tort, in which he failed to show that the loss was caused by the defendants' negligence, has established the fact that he had only one remedy, and, that, in resorting to the former action, he misconceived his rights; but he is not precluded from pursuing the remedy he in fact had, because he misconceived his rights and resorted to a supposed remedy, which he did not have. The remedy he in fact had, and the one he supposed he had, and would have had, if his evidence had been sufficient, are entirely consistent; and, by resorting to his supposed remedy, in the first instance, he did not disaffirm the defendants' contract, or in any way affect the alleged breach of the defendants' promise.

The jury having found, from evidence that was legally admissible, that the defendants agreed to repair and keep in repair the property and return it in as good condition as it was when they took it, the plaintiff was entitled to recover the damage sustained by him by reason of the defendants' failure to do so, notwithstanding the property was destroyed by fire. A few authorities may be cited in support of this holding. In *Hoy* v. *Holt*, 91 Penn. St. 88: 36 Am. Rep. 659, it is held, that, where, in a lease, there is an express and unconditional agreement to repair and keep in repair, the

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tenant is bound to do so, though the premises be destroyed by fire or other accident. In *Phillips* v. *Stevens*, 16 Mass. 238, it is held, that, where a lessee covenants to keep the demised premises in repair, and, at the termination of the lease, to surrender them in as good condition as they were at the date of the lease, if the buildings are destroyed by fire during the term without the fault of the tenant, he will be bound to rebuild them. Chitty, in his work on contracts, p. 359, lays down the same rule. In *Polack* v. *Pioche*, 35 Cal. 416: 95 Am. Dec. 115, and in *Linn* v. *Ross*, 10 Ohio 412, the holdings are to the same effect.

Judgment affirmed.

H. J. BERTOLI *vs.* E. L. SMITH & Co.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Agency—Sale of Goods not in Seller's Possession—Explanation of Conduct—Discrediting Witness by proof of Hostility.

The plaintiff, having formerly sued another party for the price of goods for which he now sued the defendants, was entitled to show the mistake under which the first action was brought.

An impeaching witness may be asked whether he has had trouble with the witness whom he discredits, but it is not error for the court to exclude inquiries touching the cause and nature of the trouble.

One who purchases from an agent who has neither the possession of the goods nor the muniments of title, cannot defend against the undisclosed principal by showing that he credited the goods on a claim against the agent, supposing him to be the owner.

When the seller is without possession or other evidence of title nothing further is needed to put the purchaser on inquiry.

ASSUMPSIT. Plea, the general issue. Trial by jury at the September Term, 1896, Washington County, *Taft*, J.,

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presiding. Verdict and judgment for the plaintiff. The defendants excepted.

The defendants requested the court to instruct the jury that if the agent was authorized to sell the tablets, and sold them in his own name without disclosing the principal, and the defendants had no knowledge of the truth, and there was nothing to excite their suspicion, they were entitled to set off any claim they had against the agent, as if the suit had been brought in his name. The instruction was refused and the jury were told that the agent would have no right to sell to the defendants and take pay by credit from the defendants upon their account against him. To the refusal and the charge the defendants excepted.

John W. Gordon for the defendants.

Fred L. Laird for the plaintiff.

MUNSON, J. The tablets for which the plaintiff seeks to recover were sold to the defendants by one W. A. Rice, who received credit for them on an account which the defendants had against him. The plaintiffs' evidence tended to show that he was the owner of the tablets, and had specially authorized Rice to make the sale. The defendants' evidence tended to show that the plaintiff's ownership was not disclosed, and that they bought with an understanding that Rice was the owner.

The plaintiff testified that when he called upon the defendants for payment they told him they had paid Rice, and that he understood from this that they had paid him in money, and thereupon brought a suit against Rice. The testimony as to his understanding was objected to, but was properly received. It was permissible for the plaintiff to explain how he came to sue Rice, and as a part of that explanation to state what he understood from the statement that Rice had been paid. The bringing of the suit against Rice upon such information and understanding cannot be urged in defense of this suit. Action taken without a

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knowledge of the facts does not amount to an election. 7 Ency. Plead. & Pract. 366. See *White* v. *White*, 68 Vt. 161.

The plaintiff produced witnesses who testified that Rice's reputation for truth was below par. The defendant proposed to show, as affecting the credibility of the witnesses, that they had had some trouble with Rice about claims which they severally had against him, and this offer was excluded. An impeaching witness may be asked whether he has had a quarrel with the witness whom he discredits. *Long* v. *Lamkin*, 9 Cush. 361. But in showing the hostility of a witness, a party is not entitled to inquire into the cause or the particulars of the difficulty. 73 Am. Dec. 775 note; *State* v. *Glynn*, 51 Vt. 577. It was within the discretion of the court to restrict the evidence to the simple fact of trouble, and as this offer embraced more it was not error to exclude it. Nor were the defendants entitled to show that Rice was indebted to the bank of which one of these witnesses was cashier.

The defendants were not entitled to the charge requested, and the charge as given was correct as applied to the case presented. The person making this sale did not have the property in his possession. The defendants' own testimony showed that the tablets were in the shop of the plaintiff at the time of the sale, and that they went there to examine them before making the purchase. It is clear that one who purchases from an agent who has neither the possession of the goods, nor the muniments of title, cannot defend against the undisclosed principal by showing that he credited the goods on a claim against the agent, supposing that he was the owner. Mech. on Agency § 773; *Bernshouse* v. *Abbott*, 45 N. J. L. 531: 46 Am. Rep. 789. It will be found that our own cases which recognize this defense were cases where the property was in the possession of the seller. In *Lapham* v. *Green*, 9 Vt. 407, where it is said that when the suit is not brought in the name of the person ostensibly contracting it will be open to whatever defense could obtain if it were so

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brought, the goods were in the possession of the persons who made the sale. In *Cross* v. *Haskins*, 13 Vt. 536 where the court disallowed the plaintiff's claim for goods disposed of by one who was in fact their agent in a transaction which was manifestly for the seller's own benefit, it would seem that the articles were sold from a shop which was in charge of the seller, and the case is so treated in the head-note.

The defendant cites *Squires* v. *Barber*, 37 Vt. 558, as showing what must appear to deprive a purchaser of this defense. It did not appear in that case whether the seller had the possession or not, but there was enough to charge the purchaser with notice even if the seller had possession; and the case was disposed of without referring to the question of possession. There is nothing in the opinion to justify a claim that the notice held sufficient in that case is necessary in all cases. When the seller is without possession or other evidence of title, nothing further is needed to put the purchaser on inquiry.

Judgment affirmed.

STATE *vs.* JAMES SHEDRICK.

January Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER and START, JJ.

Former Acquittal—Maiden.

The respondent to an indictment for adultery pleaded in bar his former acquittal of a charge of rape upon the same person, the indictment for adultery describing the female as a "maiden" and her testimony upon the trial for rape having been that she had never before had connection with a man. *Held*, insufficient; the word, "maiden," meaning a young unmarried woman, not necessarily one who had preserved her chastity.

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INDICTMENT FOR ADULTERY. Plea, former acquittal. Replication, traverse. Trial by court at the December Term, 1896, Windsor County, *Munson*, J., presiding. Plea overruled. Respondent adjudged guilty, in default of further plea. The respondent excepted.

Wm. B. C. Stickney for the respondent.

The offenses charged in the two indictments are in legal effect the same transaction. If it had turned out that the girl was above the age of consent, the offense would have been adultery, the respondent being married. Hence the two indictments, both found by the same grand jury, were intended to describe the same transaction. The identity of the parties appears. The identity of the transaction (that is, carnal knowledge of the same parties) appears. Looking to the indictment only, the identity of time appears. See *State* v. *Norton*, 45 Vt. 258.

The true test is, whether the prisoner could have been convicted on the former indictment; for if he could he must be acquitted on the second. *Rex* v. *Dann*, 1 Moody, C. C. 424, 426; *Rex* v. *Sheen*, 2 Carr. & P. 634, 639.

When one offense is a necessary element in another offense and both are in fact but one transaction, an acquittal of one is a bar to a prosecution for the other. *State* v. *Smith*, 43 Vt. 324.

A crime cannot be split up and prosecuted in parts. *Jackson* v. *State*, 14 Ind. 327; *Reg.* v. *Elaington*, 9 Cox Cr. Cas. 86, 90; *State* v. *Cooper*, 13 N. J. Law 361.

The description of the person makes the identity of the transaction certain. The evidence in the former case was, "it was the first time any one ever had sexual intercourse with her." The description in this count is, "she then and there being a maiden." "A maiden" is "applied to a female child, to a female who has preserved her chasity, a virgin." Richardson's Dict. See Century Dict; Shakespeare, Much Ado about Nothing; IV, I, 40; King Lear, I, 5, last lines; St. Westm., 3 Edw. I, 25 April 1275, Cap. 13.

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James G. Harvey, State's Attorney, for the State.

The indictment stands by itself. The act charged is not the act testified to in the prosecution for rape, but was committed later.

Ross, C. J. The contention is, whether the respondent's acquittal of the charge of rape on the facts found by the court, is a bar of the charge of adultery made in the present indictment. Each charge is by indictment, found by the same grand jury, at the same term of court, alleged to have been committed on the same day, upon the same female. In the indictment for rape, on which the respondent was acquitted, she is described as a female child under the age of fourteen years, the age of legal consent; and in the indictment for adultery, she is described as a *maiden*, not the wife of the respondent. Both crimes are charged to have been committed on July 20, 1893. The plea in bar was traversed and the trial had by the court. The identity of the respondent in the two indictments, and of the girl upon whom the crimes are charged to have been committed, is found by the court. It is also found that the evidence of the State, on the trial for rape, tended to show that that crime was committed upon the girl when only twelve years old, before the twentieth day of July, 1893; that the girl testified to the commission of the offense, and that it was the first time any one had had sexual intercourse with her. By the verdict the respondent was found not guilty of having committed this offense. The indictments were found at the December Term of the court for 1896. To have an acquittal, or conviction, of one charge bar another, both must arise out of the same transaction. The respondent's counsel concedes this. The county court do not find that these charges arose out of the same transaction. But the respondent's counsel contends that the description of the girl in the indictment for adultery—that she was then a *maiden*—means that she was then a virgin, and, therefore,

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the transaction must have been the same to which she testified on the trial upon the indictment for rape. But this is not the usual and ordinary meaning of the word, maiden. Webster's and Worcester's Unabridged Dictionaries give as the first definition of maid and maiden, "an unmarried woman." They also give "virgin" as another definition. The full first definition of the word as contained in the Century Dictionary is, "a young unmarried woman, a girl. Specifically a girl of marriageable age, but applied usually with *little* or some other qualifying term to a female child of any age above infancy." Richardson's English Dictionary gives these meanings to the word: "a female child, a female who has preserved her chastity, a virgin, a female servant." From these definitions, by the foremost lexicographers, it results that the common, ordinary meaning of the word, maiden, is a young unmarried woman, or female. We think the State, in its proof, is not bound to go beyond this meaning of the word, maiden, to answer the description of the girl with whom the crime is charged to have been committed in the present indictment. With this meaning of the descriptive word, maiden, the acquittal of the charge of rape only bars the State from prosecuting the respondent for the adultery arising out of that same transaction, but not from prosecuting him for the commission of adultery with her at another time. There was, therefore, no error in the proceedings in the county court and the respondent takes nothing by his exceptions.

But, agreeably to the stipulation, judgment and sentence are reversed pro forma, and the cause remanded, that the respondent may have leave to withdraw his plea in bar, and to plead, not guilty, and be tried thereon.

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HENRY G. MORTON *vs.* JOHN J. THOMPSON.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Covenant Amounting to Grant—Grant with Defeasance—Right of Way Appurtenant—Amendment.

A grantor conveying a part of his lot, covenants "for himself, his heirs and assigns that the space between the tavern-house and the land conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed until the grantor shall by deed convey to the grantee a convenient passage for teams to the rear of said land herein conveyed from some known public street." The orator is the owner, through several mesne conveyances, of the land conveyed; the defendant is in possession of the remainder, claiming title under a deed which is the last in a chain down which the possession, at least, has passed. *Held,*

That the language, though sounding in covenant, amounts to a grant and creates an easement in the defendant's land, which is appurtenant to the orator's land and enures to his benefit;

That the covenant is a grant with a defeasance and the latter enures to the benefit of the defendant;

That the orator is entitled to have the whole space kept open until tendered a deed of the new way, although the building erected thereon by the defendant still leaves him a convenient, but less convenient, passage;

That it is no objection to the new way tendered that it must be used by the orator in common with others, the master having found it to be sufficient;

That the defendant should be allowed to amend his cross-bill by alleging a tender of a deed of the new way since the hearing was begun before the master.

BILL IN CHANCERY. Heard on pleadings, master's report, exceptions thereto by both parties and orator's motion to recommit, at chambers, December 30, 1896, before *Ross*, Chancellor, who, *pro forma*, overruled the motion and exceptions and dismissed the bill with costs. The orator appealed.

Hogan & Royce for the orator.

The covenant runs with the land and enures to the benefit

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of the orator. *Kellogg* v. *Robinson*, 6 Vt. 276; *Clement's Admrs.* v. *Putnam*, 68 Vt. 285; II Wash. Real Prop. 298 and cases there cited; *Thomas* v. *Poole*, 7 Gray 83. And the orator is entitled to have the whole space left open. *Tucker* v. *Howard*, 122 Mass. 529; *Nash* v. *N. E. Mut. Life Insurance Co.*, 127 Mass. 91; *Salisbury* v. *Andrews*, 128 Mass. 336; *Schwoerer* v. *Boylston Market Ass'n*, 99 Mass. 285; *Clement's Admrs.* v. *Putnam*, *supra*.

The defendant cannot compel the orator to accept another right of way in lieu of the open space. The right reserved to Barlow was personal and died with him. Wash., Easements (4 ed.) pp. 17 and 18; *Pearson* v. *Hartman*, 100 Pa. 84; *Pierce* v. *Keator*, 70 N. Y. 419.

Wilson & Hall for the defendant.

If the orator has any right it is only to a right of way in said space, and that only until another is tendered him. The master finds that the building erected by the defendant did not interfere with the first and that he had been tendered a deed of a sufficient other way. The bill should therefore be dismissed and the prayer of the cross bill granted.

The orator has not shown title.

The defendant is entitled to the benefit of the defeasance clause.

ROWELL, J. This is a bill to enjoin the obstruction of a way over the land that the defendant occupies and claims to own, to adjoining land that the orator occupies and claims to own.

On January 11, 1853, Samuel H. Barlow, the then owner of all the land, on the south side of which was a tavern known as the American House, by his warranty deed of that date, conveyed to the president, directors and company of the Franklin County Bank, the land occupied by the orator. In and by said deed, he covenanted, among other things, as follows: "And the said Barlow, for himself, his heirs and assigns, doth covenant and agree that the space between the

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tavern-house and the land herein conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed, until said Barlow shall, by deed, convey to said bank a convenient passage for teams to the rear of said land herein conveyed, from some known public street."

The orator claims to have derived title to the bank property by several mesne conveyances, and the defendant claims to have derived title in like manner to the rest of the original hotel property. Each party, in argument, disputes the title of the other; but the orator's title is admitted, as it is well alleged in the bill and not denied nor put in issue by the answer. Chancery Rule 20. The defendant's title is not admitted nor found by the master. While there is probably no doubt that he has title, it is difficult to make it out from the abstract before us. There are, however, some things about it that are certain enough. The master finds, and the cross-bill asserts, that Hiram Pierce owned the American House property in November, 1866; and the exhibits show that he continued to own it for several years thereafter. The original bill alleges that the defendant claims title to that property under a deed thereof from Stroud and wife, dated January 27, 1893, and that all the title he has thereto he derives through Samuel H. Barlow and his heirs, representatives, and assigns; and it appears that Mrs. Stroud was in that chain of title. Take this in connection with the finding that the owners and occupants of the hotel property have used it for a hotel from the time Barlow occupied it down to the present time, and it sufficiently appears that the defendant's deed is the last link in a chain of deeds down which the possession, at least, passed from Pierce to the successive grantees, including the defendant, and that all were in claiming under and according to their deeds.

There is no doubt that by grant the owner of land may create out of it any incorporal hereditament with which, in its nature, it is capable of being affected. In this way land may be charged with rents, commons, ways, the privilege of

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light, air, water, and the like. Moreover, with the exception perhaps of rent, such incorporeal hereditaments may, as in the case of common appurtenant, be attached to other land so that the right to enjoy them will vest successively in every one to whom such other land shall come by assignment. Nor need the instrument by which an incorporal hereditament of this kind is created or enlarged be a formal grant; for although it be in the guise of a covenant, yet if it be properly executed, and express an intention to grant, the effect of a grant will be given to it, and rights will pass thereunder by assignment when nothing would have passed by the assignment of a mere covenant. *Holms* v. *Seller*, 3 Lev. 305; *Greene* v. *Creighton*, 7 R. I. 1; *Bronson* v. *Coffin*, 108 Mass. 175, 180; 1 Smith's Lead Cas. [*143].

Although the language quoted from Barlow's deed sounds in covenant, yet it manifests an intent to grant, and therefore it is held to amount to a grant, and to create an easement in the defendant's land that attaches, and is appurtenant, to the orator's land, and enures to his benefit, especially as it is admitted that he is in privity of estate with the original grantee of said land. *Gunson* v. *Healy*, 100 Pa. St. 42.

But we do not regard it essential that he should be in such privity; for there is a distinction between things that run only with the estate in the land and things that are attached to the land itself. "Note," says Lord Coke, "a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land." *Chudleigh's Case*, 1 Rep. [122b]. In the latter class of cases, of which easements are a conspicuous example, when the right is once acquired, whether by prescription, grant, or covenant, it attaches to the land for the benefit of which it was acquired, and sticks so fast to it that it goes with it, regardless of privity, into all hands, even those of a disseisor. "So a disseisor, abator,

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intruder, or the lord of escheat, etc., shall have them as things annexed to the land." *Chudleigh's Case*, 1 Rep. [122b]; *Norcross* v. *James*, 140 Mass. 188; *Brewer* v. *Marshall*, 18 N. J. Eq. at p. 344: *Nevil's Case*, Plowd. 377, 380.

But the defendant says he has not infringed the orator's right of way, as the master finds that notwithstanding the structure complained of, a part of which is on the rear of the "space" that Barlow covenanted to "keep open," there is still "room left for a convenient right of way for the passage of teams from Main Street to the west end of the orator's premises for all reasonable purposes required by the owners of the bank property." On the west end of the orator's lot, in the rear of his building, there is an open space, eight feet wide, upon which, according to Barlow's deed, no building can be erected that shall exceed eight feet in height. The orator claimed before the master that he has not only a right of way for the passage of teams to the west end of his premises, but also for the passage of modern two-horse coal teams, and other two-horse teams, to and upon said eight-foot strip. The master finds that before the erection of said structure, such teams could be driven over the space between the buildings, to and upon said eight-foot strip, but that since its erection, and because of it, they cannot be.

The language of the covenant is, that "the space between the tavern-house and the land herein conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed, until," etc. This language covers the whole space, and when we consider, as we must, the subject-matter of the covenant and the circumstances in which it was made, the words, "to the west end of the land herein conveyed," cannot well be limited to mean that teams might pass over said space to, but not upon, that end, for it is fair to suppose that the parties intended a way as beneficial to the property conveyed as it reasonably could be, as that end of it was not

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otherwise accessible; and it is obvious that to drive upon that end might often be extremely convenient in discharging heavy articles into the basement and other parts of the rear of the building. It is considered, therefore, that the defendant has infringed the orator's right of way by the structure complained of.

But the defendant says, if this is so, that still he has a right under the Barlow deed to terminate and extinguish that right of way by providing the orator another way from some known public street, which he claimed to have done before he began said structure; and he filed a cross-bill, to compel the orator to accept the deed tendered of such other way. The orator claims that the right reserved by Barlow to provide another way was merely a personal right or privilege reserved to himself and not to his heirs nor assigns, and that as he did not see fit to exercise the right, it died with him, and did not pass to his heirs nor assigns, as it could not run with the land, and even if it did run with the land, that the defendant is not in position to exercise it, as he has not shown title to the hotel property.

But this covenant is a grant with a defeasance, and the grant and the defeasance are parts of the same thing and must go together, as such, we think, was the intention of the grantor. He covenants for himself, his heirs and assigns. It is a rule that every word must be given effect if it can be, and none be rejected. The words, "heirs and assigns," can have no effect if the right to defeat the grant is confined to the grantor himself, for without those words the covenant would be just as effective as a grant as it is with them, and just as binding upon his heirs and assigns. Why should he be covenanting that his heirs and assigns, and especially his heirs, should keep the space open, if he understood that he alone could do the thing that would close it? But if he intended that they also should have the right to do that thing if he did not, then his covenanting for them is accounted for. It is considered that the words

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"his heirs and assigns," must be carried forward and read in after the grantor's name in the defeasance clause, in order to effectuate his intention, which appears to have been, that the benefit should go with the burden, which is highly equitable in this case. The real essence of the covenant is, that the way thereby granted shall remain until another is substituted in accordance therewith by some one interested in the servient estate.

A case somewhat analogous is *The Duke of Northumberland* v. *Errington*, 5 T. R. 522. There, in an indenture of lease of coal mines, two lessees covenanted "jointly and severally in manner following." Then followed a string of covenants as to working the mines, and then a covenant that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, etc., not saying, "and each of them,"—and it was held that the general words extended to all the subsequent covenants on the part of the lessees throughout the deed, as there was nothing in the nature of the subject to restrain them to the former part of the lease. It was said that it would not have answered the lessor's purpose that each of the lessees should be bound separately by the covenants that related to the working of the mines unless each was also answerable for the products of the mines.

If this covenant is viewed as annexed to the estate of the land in privity, yet has the defendant a title that enables him to avail himself of its benefit, for possession under a claim of title is an estate sufficient for the transmission of covenants that run with the land, when that possession goes by deed from one to another and is of such a character that it would ripen into title in the requisite time. *Beddoe's Executor* v. *Wadsworth*, 21 Wend. 120; *Slator* v. *Rawson*, 6 Met. 439: Rawle, Cov. (4th ed.) 372: 3 Am. Law Reg. N. S. 208.

Before the defendant began the structure complained of, he tendered to the orator a deed of another right of way,

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which the orator objected to for divers reasons, but not because the defendant had no right to tender it, and refused to accept, and which the master finds does not convey a convenient and sufficient right of way. The cross-bill was based on the tender of this deed. During the hearing before the master, and after the completion of said structure, the defendant tendered to the orator another deed, enlarging the right of way in the first deed, and to take the place of that deed, if the master should find the right of way thereby conveyed insufficient and the right of way conveyed by the second deed sufficient, which last the master does. But the orator says that finding is unwarranted, for that the way thereby conveyed is too narrow, and is to be used in common with others. The orator is not entitled to a way devoted exclusively to his use and the use of his successors in title; and as to the sufficiency of the way, that is a question of fact for the master.

In the view we have taken of the case, it is unneccessary to consider any other of the orator's exceptions to the report.

The cross-bill has never been amended by setting up said last-mentioned deed, and therefore the orator claims that the defendant cannot avail himself of it. But inasmuch as we hold that the defendant has the right to defeat the grant in Barlow's deed, the exercise of that right ought not to be temporarily defeated because of the lack indicated, but an amendment should be allowed to remedy the objection.

But the defendant was in fault in obstructing the orator's way before he provided another sufficient way, therefore the original bill was well brought, and the orator should have his costs. But on amending the cross-bill as indicated, and filing said last-mentioned deed with the clerk for the orator, a decree should be entered that the orator accept and receive said deed in discharge and release of the right of way conveyed by Barlow's deed, and execute to the defendant a proper deed of such discharge and release;

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and then the original bill should be dismissed with costs to the orator therein. But in default of such amendment and filing, the cross-bill should be dismissed with costs to the defendant therein, and a decree be entered for the orator in the original bill according to the prayer thereof, without damages but with costs.

Reversed and remanded, with mandate.

ALLEN J. BROWN *vs.* WEST, STONE & CO.

January Term, 1897.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Agency—Notice of Limitation.

One who purchases goods through an agent, and receives invoices at a list price, knowing that the principal is under contract with the manufacturer not to sell for less, is not justified in settling with the agent at a discount, without inquiring of the principal respecting the agent's authority.

ASSUMPSIT. Plea, general issue, with declaration in offset. Heard upon the report of a referee at the December Term, 1895, Windsor County, *Rowell*, J., presiding. Judgment for the plaintiff. The defendants excepted.

The referee found that if the plaintiff was entitled to the discounts he should have judgment for a sum stated, otherwise judgment should be for the defendants.

W. W. Stickney and *J. G. Sargent* for the defendants.

Fair dealing required the plaintiff to inquire of the principals rather than connive with the agent in attempting to reap the benefit of a breach of trust. He was put upon inquiry by the information he received. *Mussey* v. *Beecher*, 3 Cush. 511; *Quinlan* v. *Insurance Co.*, 133 N. Y. 356: 28 Am. St. 645.

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Frank A. Walker for the plaintiff.

The defendants were bound by the contract for discounts because Andrews was held out as their general agent. *Putnam* v. *French*, 53 Vt. 402; *Cutler* v. *Boyd*, 124 Mass. 181; *Griggs* v. *Selden*, 58 Vt. 561.

The principal's secret instructions could not affect third parties. *Barber* v. *Britton*, 26 Vt. 112; *Walsh* v. *Pierce*, 12 Vt. 130.

TYLER, J. In July, August and September, 1892, the plaintiff was a retail merchant in Ludlow in this State and the defendants were wholesale grocers in Springfield, Mass. They had in their employment one Andrews as a traveling salesman who was under instructions from them to sell certain "limited goods," so called, according to price lists which they furnished him, and at no other prices, and to make collections and receipt bills in their name as rendered from their office. The defendants were under an express contract with the manufacturers of these goods not to sell them for less than the fixed prices. During this time Andrews sold the plaintiff several bills of goods, including some that were "limited," and subsequently settled with the plaintiff and allowed him discounts as agreed upon at the time of sale. Only the last three consignments are in controversy here.

The plaintiff had no express knowledge of the defendants' instructions to Andrews. He knew that Andrews sold him these goods at list prices, that the orders therefor were sent to the defendants at list prices and that the defendants rendered him bills at those prices, but he supposed that the defendants knew and assented to the deductions and that they adopted this method to evade their contract with the manufacturers.

The salesman clearly had no authority from his principals to sell the limited goods for less than the fixed prices; but the plaintiff contends that the defendants held Andrews out to the public as their general agent and as having competent

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authority to make the sales, and that they are bound by his acts. This would be the rule applicable to the case if the plaintiff did not know and had no reason to believe that the salesman's authority was limited. It was said in *Griggs* v. *Selden,* 58 Vt. 561: "In determining the liability of the principal the question is, not what authority was intended to be given the agent, but what authority was a third person dealing with him justified from the acts of the principal in believing was given him."

No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. See *Walsh* v. *Hartford Fire Insurance Co.*, 73 N. Y. 10.

The plaintiff must have known of the defendants' contract with the manufacturers, for the referee finds that he supposed that the defendants' practice of rendering him bills in accordance with the price lists and the agent making discounts on payment thereof were understood methods of evading the defendants' contract with the manufacturers not to sell below fixed prices. He knew that the defendants rendered him bills for the goods ordered by him through the salesman at the list prices, and that the salesman collected the bills of him at less than those prices. These facts were sufficient to have put the plaintiff on inquiry as to the extent of the agent's authority to make discounts. He should have inquired of the defendants whether the salesman was acting under their authority in making the deductions rather than have assumed that they were conniving to defraud the manufacturers.

Judgment reversed and judgment for defendants.

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W. H. Hughes *vs.* A. A. Kelley.

May Term, 1897.

Present: Ross, C. J., Taft, Rowell, Tyler, Munson, Start and Thompson, JJ.

Tax List Invalid—Tax Bill—Misapplication of Balance.

The plaintiff's list for 1891 was void under the holding in *Sprague* v. *Fletcher*, 69 Vt. 69, for he answered the necessary interrogatories and was denied the deductions which would have been allowed him had he been an inhabitant of this State; but he cannot raise the same objection to the list for 1890, having failed in his inventory for that year to answer the interrogatories.

The tax-bill for 1890 was not illegal, for although the taxes were blended therein, sufficient data were given to show the nature and amount of each tax.

A collector, acting in good faith and with due regard to the rights of the parties, may sell property *en masse*, instead of selling by the parcel or by the unit enough to bring the required amount, returning the balance above tax and costs to the person whose property is distrained; and if he misapply a part of the balance in payment of interest, he does not thereby become a trespasser, for the wrong is not to the property itself.

Trespass and Trover. Plea, the general issue and notice of justification under tax warrants. Heard upon the report of a referee and exceptions thereto by both parties at the September Term, 1895, Rutland County, *Rowell*, J., presiding. Judgment, *pro forma*, overruling exceptions and for the plaintiff to recover the amount specified in the report. The defendant excepted.

Fayette Potter and *G. E. Lawrence* for the defendant.

Joel C. Baker for the plaintiff.

Rowell, J. This is trespass and trover for 160 squares of roofing slate. The defendant justifies as collector of taxes of the town of Pawlet under tax-bills and warrants for the years 1890 and 1891 respectively. The plaintiff claims that

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his list for each of those years was void, for that he was not allowed his claimed deductions for debts owing.

As to his list for 1891, his claim is well founded, for he truthfully and properly answered all the interrogatories in his inventory of that year that were necessary to be answered in order to entitle him to such deduction. The listers refused to make such deduction because he had personal property in New York, where he was domiciled, which he did not put into his inventory, but which was taxed in New York. This property was not taxable here, for non-resident taxpayers and resident taxpayers stand alike in respect of such property—*Sprague* v. *Fletcher*, 69 Vt. 69—and our statute exempts from taxation personal estate owned by inhabitants of this state, situate and taxed in another state. V. S. 362, subdivision IV.

But as to his list for 1890, his claim is not well founded, for he did not answer any of the interrogatories in his inventory of that year necessary to be answered in order to entitle him to such deduction; so his list for that year is valid.

But he claims that the tax-bill of that year is invalid, for that the taxes therein assessed are blended, and not kept separate and placed in different columns. Conceding without deciding that the tax-bill should show to the taxpayer the nature and amount of each tax that is assessed against him, that he may pay or tender the amount of such as he considers legal and refuse to pay such as he considers illegal, yet it is a rule of law as well as of logic that that is sufficiently certain that can be made certain, and in this case the nature and amount of the plaintiff's taxes can be made certain from the tax-bill itself. The selectmen are authorized to include all taxes in one tax-bill, and it is their duty to certify on each tax-bill made out by them what taxes are included therein and the rate per cent. of each tax so included. V. S. 3017. The tax-bill in question gives the amount of the plaintiff's list, and the selectmen certified

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thereon that it includes a town tax of 30 per cent. and a highway tax of 15 per cent. voted by the town on the grand list of 1890, making in all a tax of 45 per cent. From this data the plaintiff could readily acquire all the information that the rate-bill would have given him had the taxes not been blended. This objection, therefore, is not well founded.

The warrant annexed to this tax-bill is in the statutory form, and therfore sufficient.

The defendant collected $12.88 interest on this tax, which he had no right to do, for the tax did not draw interest. *Shaw* v. *Peckett*, 26 Vt. 482. But he did not thereby become a trespasser to any extent, as he did not proceed to sell for that purpose after having sold enough to pay the tax and the costs, but sold *en masse*, and the plaintiff bid it off at only $19.08 more than enough to pay the tax without interest and the costs. The statute provides that if a tax, with costs and charges, is not paid within four days after distress is made, the collector may sell the property at public auction after posting notice thereof, and after deducting the tax and his charges, shall, on demand, return the balance realized from the sale to the person whose property was distrained, with an account of the tax and his charges. But the statute does not prescribe the manner in which the collector shall set up the property to be bid upon. From the necessity of the case, much must be left to his discretion in this respect. He is bound to act in good faith, and with due regard to the rights of the parties in interest. It does not appear that the defendant in this case acted otherwise. He could not know in advance how much the slate would bring, and it may have been the best way to put it up in one lot instead of in parcels or enough by the square to bring the money required. *Bergin* v. *Hayward*, 102 Mass. 414, 426; *Perkins* v. *Spaulding*, 2 Mich. 157.

Nor did he become a trespasser by misapplying in payment of interest a part of the balance realized, as that was not a

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wrongful act done to the property itself, but only to a portion of the fund realized therefrom. *Wilson* v. *Seavey*, 38 Vt. 221, 230.

The plaintiff, by his agent, bid off at one hundred and forty dollars the slate sold in the warrant annexed to the tax-bill for 1891; and that amount he is entitled to recover, to which we add interest by way of damages from March 5, 1892, the day of sale.

Judgment reversed and judgment for the plaintiff accordingly.

ISRAEL TRUDEAU *vs.* CLARISSA FIELD, et als.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Contracts Touching Use of Common Property Enforceable in Equity—Easement in Dam—Obligation to Repair or to Rebuild.

The bill as drawn is plainly demurrable but, upon request of both parties, is treated as if amended in certain particulars.

It is not necessary to decide whether certain covenants would be held at law to run with the land, since equity will enforce contracts entered into between prior grantors and grantees, in regard to the use of property held in common or descending from a common source, against subsequent owners affected with notice thereof.

A conveyance of "the right of drawing water" from a dam, though describing it as "a certain piece of land," and running to the grantee and his heirs and assigns forever, amounts to a grant of an easement only.

Such a conveyance creates an easement in the existing dam, only, and does not bind the grantor to maintain the dam for the benefit of the grantee.

A conveyance of rights in a mill-dam, containing a provision that the grantee shall "be at one-half the expense of keeping the dam in repair," does not bind the grantee who accepts it to share the expense of rebuilding the dam if destroyed.

A grants to B an easement in a dam, and afterwards conveys other rights in the same dam to C, which C in turn conveys to D, inserting in the conveyance a provision that D shall share the expense of rebuilding the dam in case of loss. *Held*, that B cannot enforce the provision.

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BILL IN CHANCERY. Heard upon demurrer at the February Term, 1897, Orleans County. *Taft*, Chancellor, sustained the demurrer and dismissed the bill with costs. The orator appealed.

The orator claimed as successor to the rights conveyed to Benjamin F. Herbert by Calvin Harman by the deed of June 11, 1842.

W. W. Miles for the orator.

John Young for the defendants.

ROSS, C. J. The demurrer challenges the sufficiency of the facts set forth in the bill to entitle the orator to the relief prayed for.

The bill sets forth, that, on August 26, 1827, Calvin Harman and D. W. Harman owned land on both sides of Black river in Coventry, on which there stood a saw mill and a grist mill, operated by a water power created by a dam across the river immediately above the saw mill; that on that day by a deed containing the usual covenants they conveyed the grist mill, with the land on which it stood, and certain rights in the water power to Elijah Cleveland & Co., which company was a partnership, consisting of Cleveland and three others. In the descriptive portion of the deed is this clause: "Cleveland & Co. to be at one-half of the expense of keeping the dam in repair;" that by subsequent conveyances by Cleveland alone his right and title in the grist mill property and water rights vests now in the defendant, Clarissa Field, and the other defendants interested with her. The bill does not show whether, or how, the rights of the other three partners, if at all, became vested in Cleveland, but it alleges that the condition or agreement in regard to bearing one-half the expense of keeping the dam in repair was in the subsequent conveyances. The bill then states that, on April 6, 1836, Calvin Harman, without stating whether he had become possessed of the rights and title of D. W. Harman therein,

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conveyed another portion of property by metes and bounds, and therewith, certain water rights connected with the water power and dam, to Elijah Cleveland. This conveyance was by deed poll and contained in the descriptive part of the property and rights conveyed this provision: "Provided, nevertheless that, it is understood and agreed that the said E. Cleveland shall be holden and bound to be at one-twentieth part of the expense of keeping the dam in repair from which the above water is to be taken." This right is called the Starch Factory right and is restricted to be so used as not to damage the grist mill right. The bill alleges that this right is now in defendant George D. Walworth. It does not show whether Cleveland owned the grist mill and its rights and privileges when he owned the starch factory premises and its rights and privileges. In the chain of title of the starch factory premises, Cleveland conveys to Aldrich & Burbank, but no subsequent conveyance by Aldrich is alleged or set forth. The deed from Cleveland to Aldrich & Burbank contains the provision in his deed in regard to being at one-twentieth of the expense of repairs of the dam, and adds thereto, "or of building a new dam should it become necessary." The bill further sets forth that Calvin Harman, alone, by deed June 11, 1842, conveyed to Benjamin F. Herbert, his heirs and assigns, forever, certain premises, denominated in the deed "a certain piece of land," described as follows: "The right of drawing water from the dam across Black river just above Bean's clothier shop for the purpose of doing all things, that may be done by water power in carrying on the tanning and dressing of leather, provided, at all times, that said water shall not be used for any other purpose, nor to the injury of privileges granted heretofore for other purposes." The deed contains the usual covenants by the grantor of ownership, right and title to convey, and that the premises are free from incumbrance. It then sets forth a deed by the administrator of Charles F. Herbert to the

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orator of a tannery and land on which it stands,—describing it,—"with the privileges and appurtenances thereof." It is not claimed that the last deed conveys what was conveyed by the deed from Calvin Harman to Benjamin F. Herbert otherwise than what may be included in "the privileges and appurtenances thereof." Although not stated in the bill, it is conceded, on agreement, that Charles F. Herbert took the water rights of Benjamin F. Herbert, and that the former had died intestate before the making of the administrator's deed. The bill then states that Calvin Harman by quit claim deed conveyed the saw mill premises to Elijah Cleveland, which by like conveyances have come to defendant George D. Walworth; that one of the intermediate conveyances from E. H. Taylor to Henry Hays contains the clause, "and said Hays agrees to do nine-twentieth of the expense of keeping the dam across the river at the head of the aforesaid mill. All the conveyances are by deed poll. None of them are alleged to have been recorded. Nor is it directly alleged that the conveyance of the right to the water from the dam had ever been put to use and connected with any tannery works. The dam existing at the time of the several conveyances was swept away and rebuilt mostly by the orator.

(1) From these conveyances the orator avers and contends, that by virtue of the deed from Calvin Harman,—the common source whence all the water rights sprang,—to Benjamin F. Herbert of the tannery rights and that he, his heirs, and assigns should forever enjoy the rights, an implied covenant arose on the part of the common grantor that there should forever thereafter be kept and maintained a dam substantially like the one existing at the time of the grant, from which Herbert, his heirs and assigns could take water as provided in the deed; that the grant was an easement in the premises and water rights then owned by Harman, consisting of the saw mill premises, the right to make the owner of the starch factory premises contribute

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one-twentieth of the expense of keeping the dam in repair and the right to make the owner of the grist mill premises contribute one-half such expense, and that thereby the saw mill premises, grist mill premises, and starch factory premises became burdened with the easement, and bound to keep the dam in repair in such a manner that Herbert, his heirs, and assigns, forever thereafter might fully enjoy the rights and privileges conferred by the deed to him from Calvin Harman.

Is this contention sound? In considering the soundness of this contention, we need not consider the nice questions and distinctions which have been taken and established in regard to covenants which run with land, and which are available to the covenantee's assigns,—such as whether such covenants can arise on the part of the grantee in a deed poll; whether a privity of estate exists between the parties, and whether the covenant on the part of Harman to Herbert was personal or a covenant in gross, many of which have been presented in argument and authorities in support of them cited. This is a proceeding in equity. Equity enforces contracts and covenants in regard to property entered into between prior grantors and grantees, in regard to the use of the property, especially if common property or property descending from a common source, against subsequent owners affected with actual or constructive notice of such contracts and covenants. Pom. Eq. §§ 689, 1295, 1342. Although not so alleged in the bill, it is probable that all the conveyances set forth of these several properties and rights, surrounding and connected with this water power, were duly recorded so that the parties to this suit have constructive notice of the contents of the several deeds. It is also probable that the right to take water from the dam given by the deed from Calvin Harman to Benjamin F. Herbert was in use and connected with some tannery works which were conveyed to the orator by the administrator of Charles F. Herbert, so that the water

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right then in use would be appurtenant to the tannery premises conveyed. Such use once established under the deed from Calvin Harman to Benjamin F. Herbert would be notice to or put upon inquiry—which would be equivalent to notice—all persons subsequently taking a conveyance of the water rights connected with the saw mill, and probably of the water rights connected with the grist mill and starch factory, because arising from a water power in which all had some common rights. The bill is clearly demurrable as now framed. For the purpose of passing upon the sufficiency of the bill, if amended, as it probably could be in regard to notice of the orator's rights, we shall consider it as though the amendments were made. The parties have desired us so to treat it.

The orator's contention is that he has a right in equity through Calvin Harman, from whom, in part, at least, all parties to the bill derive title to their interests in the water power and water rights, to compel those interested in that power connected with the grist mill, and with the starch factory to contribute towards the expense of putting in a new dam, in the same proportions which Calvin Harman if alive and still owning the saw mill and its privileges could have compelled them. Granting for present purposes, without conceding it, that the orator has succeeded to the rights of Calvin Harman in this respect, could Calvin Harman have compelled the owners of the grist mill property and of the starch factory property to contribute towards building a new dam across the river at that point, in case the old dam should be swept away? We think not. By accepting the property under the deeds from Calvin Harman the grantees did not directly nor impliedly covenant nor agree to contribute towards building a new dam in case the old one should perish or be swept away. They only covenanted, or agreed to contribute towards the expense of keeping the existing dam in repair. This is all the record of Harman's deeds of these rights would notify subsequent

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purchasers that the grantees had agreed to do. An agreement to contribute toward the building of a new dam is a different thing and involves different considerations from an agreement to contribute toward the expense of keeping an existing dam in repair. The former would be for all time during which, by change of conditions and circumstances, the property might have no use, or no profitable use for the water rights, and might involve large expense. The latter would ordinarily involve much less expense, be limited in duration, and leave the owner of the property the right to elect whether he would further use the power and so make himself liable to contribute towards its creation and maintenance. Equity does not make contracts for parties, it only enforces those made by them. It does not treat such contracts between prior grantor and grantee, in regard to the use of property, as the personal obligations of subsequent owners, but treats the property as charged with the expenses incurred in accordance with such contracts. Pom. Eq., *supra.* The English courts of equity confine relief to such portions of those agreements as are restrictive of the use of the property, and refuse relief when the payment and expenditure of money is required. *Whittenton Mfg. Co.* v. *Staples*, 29 L. R. A. 500 and cases cited in opinion. But in United States generally relief is granted against assignees which involves the doing of positive acts and the payment of money. *Whittenton Mfg. Co.* v. *Staples*, *supra.* The ground on which equity furnishes relief, being that, an action of law might not be available because the agreement might not be a technical covenant running with the land, inhibits the court from enlarging, in the least, the fair scope of the original agreement when applied to the circumstances and the property. We think it is clear that Calvin Harman against his grantees of the grist mill premises and the starch factory premises, if they were now alive and owning the property, had no agreement with them, to contribute towards the expense of erecting a new

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dam, if the one existing at the time of the conveyances should be swept away, much less has the orator against the assignees of such grantees. The orator does not, on any principle in law or in equity stand so related to the conveyance by Cleveland to Aldrich & Burbank and to the conveyance by Taylor to Hays that he can take advantage of the clauses inserted therein in regard to building a new dam or keeping the dam. As concerns the orator those were provisions which apply between the grantors and grantees in those deeds. On these views the orator, on the facts set forth in his bill, if amended as indicated, would have no right to the relief prayed for against the owners of the grist mill and owner of the starch factory premises.

(2). Has the orator any equitable right arising from the conveyances set forth in the bill to compel the owner of the saw mill premises and rights to contribute toward building the new dam? By his deed to Benjamin F. Herbert Calvin Harman could not impose, and did not undertake to impose, the burden of any easement upon that portion of the common water power and water rights which he had before conveyed with the grist mill and starch factory premises. The description of what that deed conveys is peculiar and should receive attention. It reads: "The right of drawing water from the dam across Black river just above Bean's clothier shop for the purpose of doing all things that may be done by water power in carrying on the tanning and dressing of leather, provided at all times that said water shall not be used for any other purpose nor to the injury of privileges granted heretofore for other purposes." The privileges before granted by Harmon were the grist mill and starch factory privileges. The privilege granted by the deed was not to create a burden upon such privileges, and so become an injury to them. Notwithstanding the deed in the granting part speaks of the premises as "a certain piece of land," the thing described as granted is *the right of drawing water from the dam*, clearly an easement as

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characterized by the orator in his bill. The deed conveys nothing more,—no land—nor does it limit the place whereon the water taken is to be used. From the deed the easement granted cannot be determined to be an appurtenance to any other particular premises. From the record of the deed no subsequent purchaser of other rights in the water power would receive actual or constructive notice that the right granted was an appurtenance of any certain premises. It was an easement to which by the terms of the grant *the dam* then in existence was servient, and only to the extent the grantor was owner thereof. The dam existing was subject to decay and to destruction by decay, or by being swept away by the water. The easement arose from the power created by that dam. It was an easement or right to use for service a structure which of itself was perishable. The grant by Harman to Herbert of this right forever was a grant of it only so long as it continued in existence. It was not unlike the grant of a way through a part of a building which one owns, to another part of the same building which the grantee has the right to use. When the building decays or is destroyed by fire no grant to rebuild it would be raised by implication. The deed says nothing in regard to Harman, or his heirs or assigns being obliged to replace the existing dam by a new one when it should from any cause cease to exist, and no implication arises of such an obligation. It is clear that no such obligation was intended to be incurred. The consideration for the deed as expressed therein is only ten dollars. A covenant or agreement never arises by implication out of a transaction against the intention of the parties to it. The right to take water is neither *land* nor *tenement* and covenants made in conveying such right are not covenants which run with the land, and are not available, at law, to the assigns of the covenantee. *Mitchell* v. *Warner*, 5 Conn. 515, in which the question is fully considered. By such conveyance the grantee acquires

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only an incorporeal hereditament. Gould on Waters, § 299; *Tuttle* v. *Harry*, 56 Conn. 194; *Watuppa Reservoir Co.* v. *MacKenzie*, 132 Mass. 75.

By the deed from Harman to Benjamin F. Herbert, the latter, his heirs and assigns acquired the right to take water for the purposes named from the then existing dam only so far as the grantor, or his assigns had rights therein and could become thereby obligated. *Linthicum* v. *Ray*, 9 Wall. 241: 19 L. C. P. Co. 657. Hence the bill on the basis on which it is drawn and seeks relief is insufficient.

(3). What right to use the water from the present dam in his tannery arising from the fact that he was allowed to rebuild the dam under his arrangement with Mrs. Field under a claim of the right; and what rights, in equity, he has to require contribution towards the expense of rebuilding the dam of those owners who are using the power thereby created, under our decisions, especially under *Hill* v. *Shorey et al*, 42 Vt. 614; *Webb* v. *Laird*, 59 Vt. 108 and *Tullar* v. *Baxter*, 59 Vt. 467; and how his agreement with Mrs. Field may effect his equitable rights against the mortgagees of the grist mill and its water rights, we have not considered and do not decide. The bill is not drawn with reference to a determination of his rights, if any, under such circumstances.

The decree sustaining the demurrer and adjudging the bill insufficient affirmed, and cause remanded.

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M. G. JEFFERS *vs.* L. D. HAZEN.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Revocation of Reference.

When a reference has been agreed upon and made a rule of court, it cannot be revoked by a party until the time for making the report has expired, but when the time has elapsed without a report being made, either party may discharge the rule.

Before the present statute requiring referees to report to the next term "after the hearing before them is closed," it was the rule that the report should be made to the next term after their appointment, and the present reference having been made under that rule was legally revoked for want of a report although the hearing had not been closed.

ASSUMPSIT. Rule of reference discharged at the March Term, 1897, Essex County, *Start*, J., presiding. The defendant excepted.

Bates & May for the defendant.

The reference was not revocable except for legal cause. *Knapp* v. *Fisher*, 49 Vt. 94.

Though the parties select the referee, the court appoints him, and the court should not discharge its rule without cause. *Haskell* v. *Whitney*, 12 Mass. 47; *Dexter* v. *Young*, 40 N. H. 130; *Ferris* v. *Munn*, 22 N. J. Law 161.

Harry Blodgett and *W. P. Stafford* for the plaintiff.

Attention is called to Rev. Stat. (1839) p. 162, §§ 21 and 22, which became R. L. 985 and 986; Acts of 1884, No. 129; V. S. 1437, 1438 and 1439; also to the following cases construing the statute: *Rice* v. *Clark*, 8 Vt. 104; *Baxter* v. *Thompson*, 25 Vt. 505; *Cook* v. *Carpenter*, 34 Vt. 121; *Lazell* v. *Houghton*, 32 Vt. 579.

TAFT, J. This cause was referred at the March Term, 1892, and continued from term to term until the September

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term, 1895, when an order was entered that the plaintiff should procure a report at the next term or become non-suit. Hearings were had between that term and the March Term, 1896, but without fault of either party, were not closed, and the case was continued at the March and September Terms, 1896. At the March Term, 1897, no report having been made, the plaintiff was permitted to revoke the order of reference, the court ruling as a matter of law that he had the right to do so. Whether this ruling is erroneous is the only question in the case before us.

The county court may by agreement of parties appoint a reference in any cause pending therein. V. S. § 1437. After a reference has been agreed upon and become a rule of court a party cannot revoke the reference and discharge the rule until the time for making the report has expired. But when such time has elapsed, and no report made, a party is not compelled to submit to a new reference and may discharge the rule if he so desires.

At the time this reference was agreed upon, no time was specified in the statute when the report should be made, but it was always treated and the rule issued as though the report must be made at the next term of court. The cases in our reports involving this question are in accord with that rule. In *Rice* v. *Clark*, 8 Vt. 104, it was held "The court have no power without consent of parties to enlarge a rule of reference." In that case no report had been made by the referee, and it was held that it required the consent of both parties to enlarge the rule. In *Baxter* v. *Thompson*, 25 Vt. 505, a report had been made and a motion to discharge the rule was denied and judgment entered on the report. In *Lazell* v. *Houghton*, 32 Vt. 579, the referees continued the hearing before them past the term when they were required to make a report, but the party appeared before them, and the cause was fully heard, and the referees reported that the rule of reference was enlarged, but the defendant objecting to the acceptance of the report, the

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court said, "although the acquiescence of the defendant in the proceedings before the referees would not entitle this objection to favor as coming from him, yet we regard the objection as being well founded, and our judgment must be controlled by its legal effect." In fact they put the proceedings before the referees after the first term of court upon the ground that they were merely arbitrators and derived their power from the consent of the parties, and that any rule in such a case, while it might be good between them, could not be enforced by judgment.

In *Knapp* v. *Fisher*, 49 Vt. 94, the referees were appointed at the December Term, 1874, of the county court and filed their report at the succeeding term. The attempt to revoke the reference was made during the term, and before the report was filed, but the report was filed afterwards, and before the term closed, and it was held that the reference could not be revoked and judgment was rendered upon the report.

In the case at bar, the referee not having made his report at the term when by the rule he was required so to do, the party had the right to have the rule discharged. The action of the court below was correct.

Since the rule in this cause was issued, by an amendment of the statute, taking effect in August, 1895, referees are required to make their report to the next term of court "after hearing before them is closed." What effect this statute may have upon a case like the one at bar we do not consider, as the case before us should be governed by the law as existing at the time the reference was made. From the record before us it does not expressly appear what the terms of the rule were but we infer that it was issued in accord with the law and practice as it then was.

Judgment affirmed and cause remanded.

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IN RE A. O. BRAINARD.

May Term, 1897.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

V. S. 2156—Judgment of County Coart Dismissing Petition in Insolvency Final.

A judgment of the county court dismissing a creditor's petition in insolvency upon the ground that the petitioner's debt is secured, is as final as if it had been rendered upon the ground that the debtor was not insolvent.

APPEAL from an order of the Court of Insolvency for the District of Franklin, adjudging A. O. Brainard an insolvent debtor on the petition of Royce A. Smith. Heard upon a motion to dismiss the petition, at the September Term, 1896, Franklin County, *Ross*, C. J., presiding. Motion granted. The petitioner excepted. In the Supreme Court the petitionee moved to dismiss the exceptions.

F. W. McGettrick for the petitioner.

The court should have passed upon the question of the debtor's insolvency. Instead of doing so, it decided against its own jurisdiction. That decision was erroneous and is revisable here.

The debt is provable; V. S. 2150; but for the purpose of adjudging the debtor insolvent, the sworn declaration in the petition is enough.

A mortgage creditor cannot dispose of his security under V. S. 2176 until the debtor has been adjudged insolvent and an assignee appointed.

The creditor's claim being provable, he can petition the debtor into insolvency, if his claim is of the required amount. *Rogers* v. *Heath*, 62 Vt. 101; *International Tr. Co.* v. *West Rutland Marble Co.*, 63 Vt. 326; *Smith* v. *Warner*, 133 Mass. 71.

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Ballard & Burleson for the petitionee.

TYLER, J. It appeared that at some time before the petition in insolvency was filed the petitionee had executed and placed on record a mortgage deed of certain real estate, purporting to secure the petitioner for the debt described in the petition; that a petition to foreclose the mortgage had been brought before these proceedings were commenced and was still pending; that the petitionee had filed an affidavit of defense alleging that the mortgage had never been delivered to nor accepted by the petitioner, and that the petitioner insisted that the mortgage did not constitute security for the debt.

The county court did not pass upon the question of the debtor's insolvency, but decided that it had not jurisdiction of the case upon the ground that the petitioner's debt was secured within the meaning of the insolvent law and therefore one upon which the debtor could not be adjudged insolvent.

The petitioner's counsel concedes that, if the county court had taken jurisdiction and considered and passed upon the question of the debtor's insolvency, its adjudication would have been final under V. S. 2156; but he insists that he was entitled to the judgment of the court upon that question, and that the court erred in dismissing the petition without such an adjudication.

Section 2156, V. S., is in substance the same as the last paragraph of section 1870, R. L., as amended by § 4 of No. 125, laws of 1884. It provides that, upon an adjudication of insolvency in the insolvency court, either party may appeal to the county court, and that the adjudication of that court, (evidently upon the question of the debtor's insolvency) shall be conclusive. But the judgment of the county court dismissing the petition was not based upon that section. The court refused to act for want of jurisdiction. Upon the finding that the petitioner was a

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secured creditor he had no standing in court, and there was no error in dismissing the petition. It was held *In re Montgomery Spool & Bobbin Co.*, 68 Vt. 29, that a judgment of the county court dismissing a petition upon the ground that the petitioning creditor had no standing in court, was final, as well as upon the question of the debtor's insolvency.

Judgment affirmed and cause remanded.

STATE, ex rel., J. W. GOODELL *vs.* J. W. McGEARY.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Charter Construed—Quo Warranto—Election—Judicial Discretion.

Under a city charter which requires the legal voters in each ward to elect annually one alderman "from among the legal voters therein," a candidate to be eligible must be a legal voter in the ward at the time of the election. It is not enough that he be a legal voter in the city, residing in the ward.

Purchasing a lot, erecting and furnishing a dwelling thereon, and completing every arrangement for its occupation as a home, are only acts preparatory to a change of residence and do not constitute that change, while the owner still occupies, of right, his former place of abode.

When a majority of the votes cast at an election are given for a candidate who is ineligible, the opposing candidate, though eligible and receiving all the other votes, is not elected, especially where it does not appear that those who voted for the leading candidate knew that he was ineligible.

The granting or withholding of leave to file the information for a writ of *quo warranto* rests in the sound discretion of the court, but, the office being an important one and the term of considerable duration, the present is held a proper case for the judgment of ouster.

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COMPLAINT AND PETITION alleging that the respondent usurps the office of alderman and praying that a writ of *quo warranto* issue against him, to the Supreme Court, for the County of Chittenden at the May Term, 1897. The defendant answered and testimony was taken. The facts disclosed by the pleadings and evidence are stated in the opinion. The complaint was made by the State's Attorney as such, and also upon relation.

Roberts & Roberts and *W. L. Burnap* for the relator.

The charter was intended to effect a distribution of the powers of government among the wards. The distinction between the city voters and the ward voters is maintained throughout. Thus, the City Judge is to be elected "from among the freemen of the city," but ward officers, "by the legal voters of each ward," "from among the legal voters therein." The word, "therein" refers to ward, not to city, for city is not named in the sentence. Consequently the candidate for alderman must be qualified to vote for alderman and this requires a two months' residence.

The respondent had not the required residence for he did not begin to reside in the fifth ward until January 6, while the election occurred March 2. All that he had done before that time was preparation merely. Residence is something more than intention, it is a fact. *Jamaica* v. *Townshend*, 19 Vt. 267.

By V. S. ch. 82, the rights of the relator are determinable in this proceeding. The respondent being disqualified, his election was a nullity and the relator having received the greatest number of lawful votes was elected. *Spear* v. *Robinson*, 29 Me. 531; II Spelling Extr. Rel. §§ 1786, 1789; *State* v. *Swearingen*, 12 Ga. 23; *State* v. *Gastinel*, 20 La. An. 114.

This is not a case where the court can exercise a discretion as in *State* v. *Fisher*, 28 Vt. 714, and *State* v. *Mead*, 56 Vt. 353, for this is a matter of private right as well as public concern. This statute was first adopted in 1876, and grew

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out of the litigation of that period (*State* v. *Smith*, 48 Vt, 14, 266) and was designed to shape the common law remedy of *quo warranto* to the trial and determination of the rights of the respective claimants. It is not like the statute, 9 Ann. ch. 20; Ang. & Ames Corp. 685. It is not a petition but a complaint. In this State the court has exercised a discretion, as to allowing a petition, only in cases when the State was not a party. Where the prosecution was by the State's Attorney the court has refused to exercise a discretion. *State* v. *Harris*, 52 Vt. 216; *State* v. *Bradford*, 32 Vt. 50. In such cases leave to file is not necessary. Ang. & Ames Corp. 687, 698. If there can be found decisions which hold that a candidate receiving the second highest number of legal votes acquires no title to the office by reason of the ineligibility of the person receiving the highest number, these lack force and application to this case under a statute which provides for this very thing and for determining the right of each.

Seneca Haselton for the respondent.

The only qualification for eligibility to the office of alderman was that the candidate should be a legal voter in the city and a resident of the ward. The word "therein" has only a territorial signification.

Even if two months' residence was required, the respondent complied with the requirement. His residence was actually in the fifth ward from the first of January.

But if the respondent cannot hold the office, the relator is not entitled to it. The votes cast for the respondent are not to be ignored in the count, and they prevented the election of the relator. An election by a minority is not to be tolerated in this country. McCrary, Elections (3 ed.) pp. 198, 199, 200 and 201; Cooley, Const. Lim. (6 ed.) 780; Dillon, Mun. Corp. (4 ed.) § 196; *State* v. *Giles*, 52 Am. Dec. 149; *Saunders* v. *Haynes*, 13 Cal. 145; *State* v. *Smith*, 14 Wis. 497; *People* v. *Clute*, 50 N. Y. 451: 10 Am. Rep. 508; *Com.* v. *Cluley*, 56 Pa. 270; *Barnum* v. *Gilman*,

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27 Minn. 466: 38 Am. Rep. 304; *Sublett* v. *Bedwell*, 47 Miss. 266: 12 Am. Rep. 338; *In re Corliss*, 11 R. I. 638: 23 Am. Rep. 538; *People* v. *Molitor*, 23 Mich. 341. See the speech of L. P. Poland in the case of *Smith* v. *Brown*, Cong. Globe, 2d session 40th Cong. pp. 1199, 1200, and of J. S. Morrill in the case of Abbott, Cong. Globe, 2d session 42d Cong. pp. 2387, 2389, both of which cases are noticed by McCrary, *ubi supra*.

Even the English rule is against the relator, for that requires proof that the electors who voted for the ineligible candidate had notice that he was ineligible. *King* v. *Hawkins*, 10 East. 211; *Rex* v. *Parry*, 14 East. 549; *Regina* v. *Mayor of Tewksbury*, 3 L. R. Q. B. 628.

At all events, the court should in the exercise of a sound discretion refuse the writ. The respondent lacked, at any rate, only four days of the necessary residence. A construction of the charter will be valueless for it has since been changed. The power and duty of the court to deny the writ is clear. *State* v. *Fisher*, 28 Vt. 714; *State* v. *Mead*, 56 Vt. 353; *Com.* v. *Jones*, 12 Pa. 365; *King* v. *Sargent*, 5 T. R. 466.

Ross, C. J. The disposition of this case involves several inquiries.

(1) Was J. W. McGeary duly elected alderman of ward five in the city of Burlington at the annual meeting holden March 2, 1897?

He received a majority of the votes cast for such officer at that meeting. Was he then eligible to the office? The answer to this question depends upon the ascertainment of the length of residence in ward five, which the charter of the city then required to render him qualified to hold the office, and whether he had resided in that ward for the required length of time. There is no contention in regard to his qualifications for the office in other respects.

The charter of the city, as it was March 2, 1897, divided the city into five wards. The same section of the

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charter which makes the division provides: "The legal voters in each ward shall annually elect one alderman, and the ward officers hereafter named, from among the legal voters therein, and shall also vote for Mayor and City Judge." We think that this requires a person to be eligible to the office of alderman to be a legal voter in the ward. This is the ordinary and natural meaning of the language, "from among the legal voters therein." "Therein" means in the ward at the time of the annual election. That is, the time the alderman is to be elected or selected out from among the legal voters in the ward. It does not mean, as contended by the counsel for Mr. McGeary, from among the legal voters for Mayor or City Judge, or other city officer, then resident in that ward. This would make the quoted clause read, "from among the legal voters of the city then resident in the ward." It would apply to the other ward officers as well. The ward officers, by other provisions of the charter, are to be chosen by the legal voters of the ward. Section thirteen of the charter creates a vacancy in the office of alderman if he removes from the ward, to commence from a certain specified time. We find no provision of the charter which changes the ordinary and natural meaning of the clause quoted, or allows the voters of a ward to select their alderman from any other class than their own number, or from the then legal voters in the ward. The charter prescribes the qualifications of voters at a city election, and also the qualifications of voters in a ward election. For the latter he must be a voter in a city election. The charter then further provides: "Every such voter shall vote only in the ward of which he is at the time an inhabitant, and he shall not vote for alderman, school commissioner, or ward officers, in any ward in which he has not resided for two months preceding any such election." Had Mr. McGeary resided in ward five for two months prior to the annual election of March 2, 1897, when he claims to have been elected alderman for that ward? He

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admits that for some years prior to January 1, 1897, he had resided in ward four of the city. There, he had rooms which he occupied with his wife. He continued to occupy these rooms and pay rent therefor until January 6, 1897. He paid rent by the month until January 1, 1897. Before that time he had arranged with his landlord that if he remained longer than until January 1, 1897, he should pay rent only for the time he remained. Hence until January 6, 1897, he occupied these rooms with his wife and slept in them of right. In fact he did not remove from them and take up his abode or place of dwelling in his new house in ward five until January 6, 1897. All he had done in purchasing the lot in ward five, in erecting a dwelling house thereon, in preparing it for occupancy, in moving into it the things necessary for occupying it for a home, from his rooms in ward four and from other sources, was preparatory to making his abode therein January 6, 1897. For a year or more he had been intending to make the new house his home at some future time, but the intention alone, or with preparations added, did not make it his home. The final act which transferred his home from the rooms in ward four to the new house in ward five was when he ceased to occupy the rooms with his wife, as a place of abode on January 6, 1897, and took up his abode in his new house in ward five. Hence on March 2, 1897, he had not resided two full months in ward five, was not therein a legal voter for ward officers, and therefore not eligible to be elected alderman for that ward.

(2). Was the relator duly elected alderman for ward five at this election? He did not receive a majority of the votes cast. It is not established that the legal voters of the ward who cast their votes for Mr. McGeary knew that the provisions of the then charter required them to elect an alderman from among the legal voters in the ward, nor that he was not then a legal voter in the ward. By all the decisions, English and American, such knowledge by the

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voter must be clearly established to have his vote treated as knowingly and purposely cast for a person ineligible to the office, and for that reason not to be counted but to be treated as thrown away. Hence under the most liberal rule in regard to rejecting votes cast by legal voters at an election, the votes cast for Mr. McGeary are not to be treated as though they had not been cast. But under our system of government where the will of the legal voters, as expresesd by their ballots, controls, it has been almost universally held that to ensure an election a majority or plurality,—as may, by law, be required,—of the legal votes cast must be received. Votes cast by legal voters are not to rejected, although, by the voter cast for a person known to be ineligible for the office. *King* v. *Hawkins*, 10 East. 210; *Rex* v. *Parry*, 14 East. 549; *State* v. *Giles*, 52 Am. Dec. 149 and note, and other cases cited by the defendant. Hence the relator cannot be declared elected if McGeary is ousted.

(3). It is conceded, as is held by our decisions, that the granting, or withholding, leave to file an information in the nature of a *quo warranto* against a respondent for exercising the functions of an office to which he has not been duly elected, either because he did not receive the required number of legal votes, or was not then eligible to the office, rests in sound judicial discretion. If the office is of very small importance; if it is for a short term, or the term has nearly expired; if no other person complains of being deprived of the officc; and if the objection taken to the respondent's holding the office is technical and of no considerable practical importance, the leave to file an information is refused. *State* v. *Fisher*, 28 Vt. 714, endorsed in *State* v. *Mead*, 56 Vt. 353. But if it is an office of importance, the proper exercise of which may seriously affect public interests or private rights, like the management and control of great moneyed corporations, or the quiet and good government of a municipality, involving the interests of large numbers, leave is usually granted to file the information, and

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judgment of ouster from the office is rendered thereon, although no other person has been duly elected to the office. The office in contention is an important one, touching many interests of the largest city of the State and of its inhabitants, and it is to continue for nearly two years. Under our form of government, "of the people, by the people, for the people," it is of importance that no one should be allowed to exercise the functions of an important municipal office unless duly elected thereto according to law. In no other way can a high respect for law be maintained. Without a general prevalence of high respect for the law among the people, the rights of the people become unstable and insecure. No one has been legally elected alderman for ward five. It is an office of importance. It is the right of the legal voters of the ward to determine who shall serve them in that capacity.

Let the information be filed and judgment of ouster against the respondent be entered thereon. No costs to either party.

W. O. SHATTUCK *vs.* THE WROUGHT IRON RANGE CO.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ

V. S. 1232—Treating Jury—Agency.

One, whom the court found to represent the recovering party at the trial, procured the jury to be treated to cigars during the term, and the verdict was set aside under V. S. 1232. *Affirmed.*

ASSUMPSIT for breach of warranty of a range sold to the plaintiff by the defendant. Trial by jury at the December Term, 1896, Caledonia County, *Taft*, J., presiding. Verdict

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for the defendant. The plaintiff moved to set aside the verdict and upon hearing the motion was granted. The defendant excepted.

The court found that C. A. Day soon after the return of the verdict procured the jury to be treated to cigars; that Day had been a witness for the defendant upon the trial, and its superintendent for the territory in which the sale was made, and attended the trial as the representative of the defendant. There was no evidence that the defendant directed or ratified the act of Day in treating the jury.

Bates, May & Simonds for the defendant.

Day's act ought not to bind the defendant for it was unlawful and was never directed nor ratified by it. The act was not fairly within the scope of his authority even if he was the general agent of the defendant.

W. P. Stafford for the plaintiff.

TYLER, J The finding of the county court that Day represented the defendant is conclusive, and brings the case within the provisions of V. S. 1232, as construed in *Baker* v. *Jacobs*, 64 Vt. 197. The court properly set the verdict aside.

Judgment affirmed and new trial granted.

FRANCIS GUILTINAN, admr., *vs.* THE METROPOLITAN LIFE INSURANCE CO.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, and START, JJ.

Warranties in Application for Insurance—Burden of Proof—Engaged in Sale of Alcohol—Presumption of Innocence—Comments of Counsel.

Answers, in an application for life insurance, in respect to the personal habits of the insured and diseases with which he and his relatives have been afflicted, though stated to be warranties and the basis of the

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contract, need not be proved by the plaintiff, the administrator of the insured, in an action upon the policy, but the defendant must establish their untruthfulness if it relies thereon.

A warranty that the applicant has never been engaged in the sale of alcoholic beverages, is not broken by the fact that, as an assistant in a hotel, he has, at times, by the direction of his employer, or otherwise, furnished guests with such liquors and taken pay from them, if such service was no part of his general business or employment.

The defendant charged that the insured obtained a policy of insurance by fraud; therefore the instruction that the insured was entitled to the presumption of innocence was correct.

The remarks of the plaintiff's counsel upon the conduct of the defendant were justified by the evidence.

GENERAL AND SPECIAL ASSUMPSIT upon a policy of life insurance. Plea, the general issue, with notice of special matter in defense. Trial by jury at the December Term, 1896, Bennington County, *Thompson*, J., presiding. General and special verdicts, and judgment thereon, for the plaintiff. The defendant excepted.

The application contained the following questions, each of which the applicant answered in the negative:

"*Question H.* Are you now, either directly or indirectly, concerned in either the manufacture or sale of any kind of alcoholic beverages?"

"*Question H a.* Have you ever been so engaged?"

Rolan Taylor, a witness for the defendant, testified that in the spring before the application was made, he frequently visited the hotel in which the insured was then employed, in the village of Bennington, and as many as ten times purchased whiskey which was sold to him by, and for which he paid, the insured. The plaintiff produced Harry Kenyon, who testified that he was the manager of the hotel during that period and had control of the bar and that while the insured might possibly have served some liquor, the witness was never aware of it and had almost the constant oversight of the business. The plaintiff also produced other witnesses, who knew the insured and were frequently about the hotel during that period, who testified that they

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had never seen the insured take any part in the sale of liquors. There was no other testimony to contradict that of Taylor.

At the conclusion of the evidence the defendant moved for a verdict on the ground that the undisputed evidence showed that the answers to questions "H" and "H a" were false. The motion was denied, *pro forma*, and the defendant excepted.

The plaintiff introduced the proof of death. In argument to the jury counsel for the plaintiff, against the objection and exception of the defendant, was allowed to call attention to the statement of the defendant's agent therein to the effect that he believed the statements of the physician to be true, among which statements was one certifying that the insured used no intoxicants except by his, the physician's, order, whereas the defendant was now attempting to defeat the policy on the ground, among others, that the insured had been addicted to the use of intoxicants; and to say, "if that is the way this company is going to treat its policy holders, the policy holders need some protection by statute."

The court instructed the jury to return special verdicts in reference to the truth of each of the answers in the application which the defendant claimed to be false, and, in case any of the answers were untrue, to return a general verdict for the defendant, but that the burden was upon the defendant to show that the answers were untrue; to which the defendant excepted.

The defendant requested the court to charge that if the insured, before the date of the application, had ever as clerk, servant or agent, sold alcoholic beverages, he was "engaged in the sale" within the meaning of the contract. The court declined and the defendant excepted.

Dillingham, *Huse & Howland* and *F. C. Archibald* for the defendant.

The motion for a verdict should have been granted. There

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was really no contradiction of Taylor's evidence, and if it was true, the insured was "engaged in the sale of alcoholic beverages."

The court should have charged, as requested, that if the insured had ever as clerk, servant or agent, sold alcoholic beverages in the hotel he was "engaged in the sale" within the meaning of the contract. The charge of the court upon that subject was erroneous. It amounts to saying that one does not do a thing which he does, unless he is specially hired to do it.

The case was not one which justified a charge on the presumption of innocence.

The argument of the plaintiff's counsel was not warranted. *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177.

The court erroneously charged that the burden of proof was upon the defendant to prove that the answers of the insured were untrue. *Wilson* v. *Insurance Co.*, 4 R. I. 159; *Sweeney* v. *Insurance Co.*, 36 Atl. Rep. 9; *Craig* v. *Insurance Co.*, 1 Peters C. C. 410: Phillips's Insurance, § 2122; *McLoon* v. *Insurance Co.*, 100 Mass. 472.

Batchelder & Bates and *Barber & Darling* for the plaintiff.

The motion for a verdict was properly refused because there was a conflict in the testimony.

The charge of the court was correct upon the meaning of the language, "engaged in the sale of alcoholic beverages." *Insurance Co.* v. *Muskegon Bank*, 122 U. S. 501; *Insurance Co.* v. *Davey*, 123 U. S. 739.

The charge as to the presumption of innocence was correct.

The burden was on the defendant to establish a breach of the warranties. *Insurance Co.* v. *Ewing*, 92 U. S. 378; *Am. Credit Indemnity Co.* v. *Wood*, 19 C. C. A. 264; *Spencer* v. *Insurance Association*, 142 N. Y. 505; *Insurance Co.* v. *Pickel*, 119 Ind. 155: 12 Am. St. 393; *Benjamin* v. *Indemnity Association*, 44 La. An. 1017: 32 Am. St. 362; *Roach* v. *Security Fund Co.*, 28 S. C. 431; *Insurance Co.* v. *Rogers*, 119

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Ill. 474; *Herron* v. *Insurance Co.*, 28 Ill. 235; *Insurance Co.* v. *Robertson*, 59 Ill. 123; *Insurance Co.* v. *Hogan*, 80 Ill. 35; *Jones* v. *Insurance Co.*, 61 N. Y. 79.

The argument of plaintiff's counsel was not a statement of fact but proper comment on the attitude of the defense.

TYLER, J. There was no error in the refusal of the trial court to direct a verdict for the defendant. The testimony of Kenyon and other witnesses called by the plaintiff tended to contradict the testimony of Taylor, and it became a question of fact for the jury whether or not the insured ever sold any liquor while he was employed at the hotel.

In answer to questions in the application the insured stated that he was not then and never had been directly or indirectly engaged in the manufacture or sale of alcoholic beverages. The court instructed the jury that if he was employed in that house generally to do what he was called upon to do from day to day, and as a part of that general employment he sold alcoholic beverages to the guests as they called for them, he was engaged in the sale of alcoholic beverages within the meaning of the contract. But on the other hand, if this was no part of his general business or employment, even though he did occasionally, out of his ordinary line of duties, by direction of his employer, or otherwise, furnish the guests with intoxicating liquors and take pay for them, he was not engaged in such sale within the meaning of the contract. This instruction was correct. The word "engaged" as used in the application means occupied, and does not relate to an occasional act outside of a regular employment, and the obvious purpose of the question was that the defendant might be informed whether or not this was the applicant's occupation. The defendant could have had no interest to ascertain whether the applicant, as a servant of the hotel, was occasionally called upon to furnish liquor to a guest.

The defendant charged that the insured obtained the policy of insurance by fraud; therefore the instruction of

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the court that the insured was entitled to the presumption of innocence was correct. *Childs* v. *Merrill*, 66 Vt. 302.

The remarks of the plaintiff's counsel upon the conduct of the defendant in resisting payment of the policy were justified by the evidence and the exception is not sustained.

It was "declared, agreed and warranted" by the applicant in his application that his answers and statements were full and true and should be the basis and become part of the contract of insurance. It was recited in the policy that the defendant's promise to pay the legal representatives of the insured the sum of two thousand dollars was made in consideration of the answers and statements contained in the printed and written application, which by the terms of the policy were made warranties and a part of the contract. This part of the policy is set out in the declaration, which also recites the condition in the policy that, if any statement contained in the printed and written application therein referred to were not true, or if any of its conditions were not observed, the policy should thereupon become void.

The declaration alleges that upon the written application of the insured the defendant made and delivered to him a policy of insurance upon his life and thereby, in consideration of the answers and statements contained in the application, insured his life for two thousand dollars and agreed to pay that sum to his legal representatives upon proof of his death. It alleges the payment of all premiums, the death of the applicant, proof of death, defendant's acceptance of the the proof, a tender of the policy and demand and refusal of payment. It does not allege that the applicant's answers and statements in his application were true, nor that he in his life-time performed all the conditions of the contract by him to be performed. The defendant raised the issue in its notice that it was not liable to pay the amount of the policy for the reason, as it alleged, that certain answers and statements made by the insured in the application in respect

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to his personal habits, and in respect to diseases with which he and certain relatives had been afflicted, were untrue.

The application contains a great number of questions that were answered by the insured, many of them relating to his occupation, to his past and present physical condition, and to his habits in respect to the use of stimulants and narcotics, about which he must have had personal knowledge, and many others relating to diseases with which his relatives had been afflicted, as: "Has either of your parents, brothers, sisters, grandparents, uncles, or aunts now or ever had consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity, or other hereditary diseases?" about which he may or may not have had personal knowledge, and yet all answers were warranted to be true.

Was it necessary for the plaintiff to allege and prove the truth of these numerous answers?

The rules of law that have been laid down relative to actions upon insurance contracts of this kind are not in harmony. The cases cited on the brief of defendant's counsel hold in effect that whether the terms used are affirmative or negative, the warranty is a condition precedent, and that its performance must be averred and proved by the party seeking to recover upon the contract. It is apparent that the enforcement of this rule would defeat a recovery in very many cases. After the lapse of years it might be impossible for the administrator to prove affirmatively that the insured never had asthma or bronchitis, or that he had never consulted any other physician than his usual medical adviser. The answers may have been strictly true and yet a failure to prove the truth of one so unimportant as that last suggested would defeat a recovery. It is the purpose of the law to give effect to contracts honestly made rather than to defeat them. To avoid the unjust results of the rule above stated it was held in *Sweeney Met.* v. *Life Insurance Co.*, 36 Atl. R. 9, (R. I.), in an action

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where the application and policy were like the ones in this case, that the answers constituted warranties so far as they rested upon the applicant's own knowledge, without deciding whether statements that obviously could not lie within his knowledge were warranties or not. The court cites *Jeffries* v. *Insurance Co.*, 22 Wall. 47, which holds that when the statements are made warranties they must be proved; that a party cannot recover upon a conditional contract until he shows that he has complied with its conditions. On the other hand, in *Insurance Co.* v. *Ewing*, 92 U. S. 377, it was said by *Justice Miller*, that if the insurer knew or believed that any of the statements were untrue, it was no hardship for it to single out the answer, the truth of which he proposed to contest, and if he had any reasonable ground to make such an issue, to show the facts on which it was founded; that the plaintiff must prove the issuing of the policy, payment of premiums, death of the assured, proof of death and general performance of conditions, but to say that because all answers are warranties the truth of every one must be proved, would be manifestly unreasonable.

In *Benjamin* v. *Conn. Indemnity Asso'n*, 32 Am. St. 362: 44 La. Ann. 1017, the modern rule is stated to be that the defendant carries the burden of proving such defenses, which involves the necessity of specially pleading them, and numerous cases are cited in support of the rule, among them May on Life Ins. § 591 and 2 Wood on Ins. § 522. Cooke on Life Ins. §§ 14, 93, 123, says that this is the prevailing rule, though this and many of the established principles of the law of life insurance are in direct contrariety to the rule requiring allegation and proof of the performance of conditions precedent. In the able opinion of the Louisiana court, after citing the above works on life insurance and many decided cases, it is said: "Finally, this court in a line of decisions has maintained the principle announced by Mr. Arnould in his work on insurance, that, as relates to policies

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of insurance," all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable, on the ground of fraud or otherwise, shall be specially pleaded. 2 Arn. on Ins., 1287. The cases cited on the brief of the plaintiff's counsel generally support this statement of the law, notably, *Spencer* v. *Insurance Association*, 142 N. Y. 505; *Continental Life Insurance Co.* v. *Rogers*, 119 Ill. 474; *Price* v. *Insurance Co.*, 17 Minn. 497.

In the present case we hold that, upon reason and authority, the plaintiff was not bound to raise an issue in respect to the truthfulness of the answers of the insured. It was a matter of defense which by our statute could be made under the general issue, but it was the duty of the defendant to point out in evidence which of the numerous answers it should contest, and the burden was upon it to establish their untruthfulness.

Judgment affirmed.

EDWARD S. WHITCOMB, admr., *vs.* THOMAS C. ROBBINS, et als.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Jurisdiction of Courts of Insolvency over Foreign Corporations.

Our courts of insolvency have no jurisdiction over a corporation created by the laws of another state and having no establishment or principal business office here, although sending its products here to be sold by special agents and owning property and contracting debts within the insolvency district.

V. S. 2166 construed.

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PETITION to the Supreme Court for the County of Chittenden at the May Term, 1896, for a writ of prohibition against Thomas C. Robbins as Judge of the Court of Insolvency for the District of Rutland, George E. Lawrence, attorney for the Walter A. Wood Mowing and Reaping Machine Co., and John D. Miller as assignee in insolvency of the same company. The defendants answered, evidence was taken and a stipulation filed, upon which the case was heard. The material facts appear in the opinion.

Powell & Powell and *W. L. Burnap* for the petitioner.

The court of insolvency is purely statutory and its jurisdiction limited. It has no powers not conferred expressly, or by necessary implication. Its action must be confined to the particular matters and parties over which the law creating it has authorized it to act. *Rhode Island* v. *Massachusetts*, 12 Peters 657; *Collamer* v. *Page*, 35 Vt. 389.

The submission of the corporation could not confer jurisdiction. Consent may facilitate the functions of the court where the law confers jurisdiction, but cannot create jurisdiction.

This corporation could not have been compelled to submit, neither could it have proceeded by voluntary petition; which shows that the court had no jurisdiction.

George E. Lawrence and *Joel C. Baker* for the defendants.

The question is, did the court have jurisdiction to adjudge this corporation an insolvent debtor.

The insolvency statute is merely a method for the collection of debts and one so much more equitable than the common law process that it should be favored. By coming into this State for the sale of its goods and the contraction of debts this corporation became subject to the jurisdiction of our courts and to their process for the collection of debts.

It is not required by the present statute that the person to be adjudged an insolvent debtor should be an inhabitant

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of this State nor, if a corporation, that it should have been created by the laws of Vermont. In these respects the statute has been amended, obviously for the purpose of making it applicable to cases like the present. V. S. 2151, 2153, 2166.

TYLER, J. It appears by the agreed statement of facts that the Wood Mowing and Reaping Machine Company was a corporation created and existing under the laws of the state of New York, and having its manufactory and home office at Hoosic Falls in that state where its manufacturing was solely done. It had agents in each county in this State to whom it sent its machines for sale and whose sole duty was to sell, collect pay for and remit the amount to the company. Its product was disposed of in the same manner in nearly all the other states. It never had agents in this State other than those above described. In Dec. 1895, it had a large number of machines and proceeds of sales of machines to a considerable amount in the hands of its agents in Rutland and other counties in this State. The complainant, who resided in Chittenden county, had for a long time been a creditor of the company, and on December 26, 1895, brought a suit against it in that county, attached a large number of machines and summoned its agents as trustees. The company was then in the hands of receivers in the state of New York. In January, 1896, an officer of the company, who was also a receiver, consulted Geo. E. Lawrence, a lawyer of Rutland, about the complainant's suit and the rights of the parties, and said Lawrence advised the instituting of insolvency proceedings in the District of Rutland. One Parris became a petitioning creditor, the petition was served upon Lawrence, who, pursuant to his employment, appeared for the company, submitted to the jurisdiction and consented to the adjudication. The complainant had no knowledge of the proceedings until he was notified to appear and prove his claim.

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The submission and consent of the corporation to the insolvency proceedings cured all defects in respect to service of process upon it, but the question is whether, upon the facts reported, the corporation could be brought within the jurisdiction of one of our insolvency courts. If the court had jurisdiction it follows that the writ of prohibition prayed for will not issue.

The defendant contends that the facts that this corporation had established a business in this State through its agents, sent its machines here for sale and contracted debts here in the transaction of its business, gave our courts jurisdiction so far as to adjudicate all matters between itself and its local creditors, and that our courts were open to our citizens to bring any proceedings under our laws for the collection of debts; that as foreign corporations may sue and be sued in this State, they are amenable to all of our laws that were enacted to facilitate the collection of debts. On the other hand, the complainant insists that the insolvency law was not originally framed nor has it since been enlarged to include within its provisions non-resident persons and corporations.

The law was passed in the year 1876, and its provisions were extended only to inhabitants of this State and to corporations created by the authority of our own laws. See §§ 15, 91, 98. The same provisions are found in the Revised Laws, § 1790: "An inhabitant of this State owing debts * * * may apply by petition" etc.; and by § 1870, "A person residing in this State," may have committed certain acts of insolvency and his creditors may petition; and by § 1879 the provisions of the act are extended to corporations "created under the laws of this State," except railroad and banking corporations. This limitation in the operation of the law continued until 1884, when by No. 138, § 2 of the acts of that session, the Revised Laws were amended by striking out the words, "created under the laws of this State," and R. L., § 1879, as thus amended, is § 2166, V. S.

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The jurisdiction and powers of the insolvency courts are only such as are conferred by statute, and it is not claimed that there was jurisdiction in this case unless obtained by the amendment of 1884.

The words, "A person residing in this State," which occur in R. L. 1870 are omitted in V. S. 2151, yet it is apparent that §§ 2151, 2152 and 2153 relate to persons who reside or have resided here and have committed certain acts. Without the aid of §§ 2152 and 2153 a person who had resided and committed acts of insolvency in this State could not, after he had changed his residence to another state, be amenable to our insolvent law though he had creditors and property here. By virtue of these sections of the statute he may be brought within the jurisdiction of our courts for the period of ninety days after the acts of insolvency were committed.

The sections last cited show a legislative intent to limit the operation of the insolvency law to residents, *inhabitants* of the State, and for a short period to persons who have moved from this into other jurisdictions. We do not construe the amendment of 1884 to have been made to remove the limitation and confer the benefits of the law upon foreign corporations that merely send their manufactured goods into this State for sale, but that corporations established in this State and having their principal office and transacting their business here may be amenable to our law, though they were created by the laws of other states. Such corporations manifestly should not be exempt from the operation of our laws.

This is the natural and reasonable construction of the statute. It could hardly be contended that the corporation in question could avail itself of our insolvency law by voluntary petition; if so, what district of the state would have jurisdiction? This construction is fully sustained by the authorities cited upon the complainant's brief.

The Massachusetts cases, arising under a statute like ours,

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are decided upon the ground of residence. In *Judd* v. *Lawrence*, 1 Cush. 531, it was held that an alien resident was entitled to the benefit of the act, and in *McConnell* v. *Kelley*, 138 Mass. 372, that the jurisdiction of the court depended upon the facts that the petitioner was an inhabitant of the state and owed debts contracted while such inhabitant.

Petition granted and a writ of prohibition directed to be issued in accordance therewith.

DIBBLE & CANEDY *vs.* THE DEERFIELD RIVER CO.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Confession and Avoidance—Replication by General Denial—V. S. 1151.

A declaration, that the defendant promised to pay a specified sum for a quit claim deed of certain land of which the plaintiffs were in possession under color of title, and that the plaintiffs tendered the defendant such a deed, is sufficiently answered by a plea denying the plaintiffs' possession.

Such a declaration, with an additional allegation that the deed was accepted by the defendants, is not answered by a plea denying the acceptance only.

A replication by way of general denial to several pleas is bad at common law on special demurrer.

It is only to pleas in confession and avoidance that a general denial is permitted by way of replication under V. S. 1151.

A plea which admits one fact, but in a different sense from that in which it is alleged, and denies other material allegations, is not a plea in confession and avoidance.

SPECIAL ASSUMPSIT. Special pleas in bar and a general replication. Heard on special demurrer to the replication at the December Term, 1896, Bennington County, *Thompson*, J., presiding. Demurrer overruled. Replication

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adjudged sufficient and cause passed to the Supreme Court upon the defendant's exceptions before final judgment.

Charles P. Chase, (*Batchelder & Bates* with him) for the defendant.

At common law a general denial by way of replication is only allowed to pleas alleging matter of excuse. *Crogate's Case*, 8 Coke 66; I Smith, Lead. Cas. 151; *Lytle* v. *Lee*, 5 John. 113; *Marshall* v. *Aiken*, 25 Vt. 327. The rule is of practical use and should be retained. Neither of these pleas contains matter of excuse.

But if this be not so, the replication is bad as attempting to raise two material issues of fact to the same plea either one of which would be a good answer.

Henry A. Harman for the plaintiff.

The special demurrer to the replication reaches, as a general demurrer, to the plea which denies an acceptance of the deed, and that plea must be held insufficient for substance.

At common law the replication could deny only one material fact alleged in the plea; but the intent of V. S. 1151 was to change the rule in this respect so as to enable the plaintiff to tender a general issue to the plea, as the defendant might to the declaration. *Austin* v. *Chittenden*, 32 Vt. 168.

If it be objected that the statute applies only to pleas in confession and avoidance, the answer is that such of these pleas as are in confession and avoidance are the only ones which required a replication, the other pleas amounting to the general issue and being for that reason bad.

MUNSON, J. It is alleged in both special counts that the plaintiffs were possessed of a certain parcel of land under color of title derived from a certain warranty deed, and that in consideration of their undertaking to execute to the defendant a quit claim deed conveying all their right, title, interest and estate in and to said parcel, and to forward the

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same to the Wilmington Savings Bank for the defendant, the defendant undertook to accept said deed and pay a specified sum for such right, title, interest and estate; and that the plaintiffs did execute such a deed and deliver the same as required, and that the defendant with knowledge of these facts took possession of said land. In the first count it is alleged that the defendant would not accept the deed, nor pay for the interest conveyed. In the second count an acceptance of the deed is alleged, and the assignment of the breach is confined to the non-payment.

In the first plea to the first special count, it is alleged that the plaintiffs were not possessed of said parcel, and that although the defendant took possession of it, it did so under another deed conveying an adverse interest. In the second plea to the same count, it is alleged that the plaintiffs had neither possession, nor right, title, interest or estate. The first plea to the second special count alleges that the defendant did not accept the deed. The second and third pleas to that count are substantially the same as the pleas to the first count, with a further allegation denying that the defendant took possession of the deed.

The replication is to all these pleas, and is that the plaintiffs "deny each and every material fact so by the said defendant pleaded as aforesaid." The replication is demurred to; the causes specially assigned being its failure to deny and put in issue any single and material fact stated in the plea, and its duplicity in putting in issue two and more several and distinct matters.

Both counts disclose a cause of action. They show that the defendant agreed to pay a specified sum for a quit claim deed of certain land of which the plaintiffs were in possession under the color of title afforded by a warranty deed, and that the plaintiffs executed and delivered a quit claim deed of all their right, title, interest and estate, in and unto said land.

Both pleas to the first special count, and the second and

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third pleas to the second special count, are good in substance. They allege that the plaintiffs were not in possession of the land described in the deed tendered. If this was true the tender of the deed did not fulfill the plaintiffs' agreement, and the defendant was not bound to accept it. The plaintiffs undertook to give a quit claim deed of land of which they had not only obtained a warranty deed, but of which they were in possession. Their possession of the land was a material element of what they undertook to convey. That possession might give value to the quit claim, even though the previous warranty was worthless.

The first plea to the second special count is bad. The denial of an acceptance of the deed does not answer the count. The defendant was liable if the plaintiffs had tendered a deed which the defendant was bound to accept.

It is clear that the replication is bad at common law and we do not understand counsel to claim the contrary. V. S. 1151 permits a general denial only as against matters pleaded in confession and avoidance. So if these pleas are held to be not of that character, the insufficiency of the replication is established. None of the pleas admit the facts alleged and avoid their effect by the introduction of new matter. All the pleas held good deny the possession of the plaintiffs; and the allegation of some of the pleas that although the defendant took possession of the land, it did so under another deed conveying an adverse interest, does not admit a taking of possession in the sense charged. The pleas not being in confession and avoidance, the replication is clearly insufficient.

Judgment reversed, demurrer sustained, judgment that the replication and third plea are insufficient, and that the first, second, fourth and fifth pleas are sufficient, and cause remanded without costs to either party.

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STATE *vs.* FRANK P. SLACK and ROMEO CLOUGH.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, START and THOMPSON, JJ.

State May Impeach Its own Witness—Inconsistent Positions—Liberality in Cross-Examination.

It is the duty of the State in criminal trials to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused. Consequently it is not, like private parties, precluded from impeaching the character of the witnesses it calls.

Whether selling liquor contrary to law be, or not, an infamous crime, the prisoners having been allowed, against objection, to impeach a witness for the State by proving his conviction of that offense, cannot object to the impeachment of their own witness in the same way.

Although one of the questions put in cross-examination to a witness for the prisoners was probably improper as an attempt to prove a conviction otherwise than by the record, the testimony elicited did not go beyond permissible bounds, in view of the liberality allowable in cross-examination for the purpose of finding out who and what the witness is.

INDICTMENT for assault with intent to rob. Plea, not guilty. Trial by jury at the December Term, 1896, Windsor County, *Munson*, J., presiding. Verdict, guilty. The respondents excepted.

In the cross-examination of Orson Sargent, he was asked in behalf of the State whether he had not been convicted in the United States Circuit Court for selling liquor without a government license, and replied that he had not, that the matter had been settled up in some other way, but exactly how he did not remember.

G. A. Davis and *D. A. Pingree* for the respondent Slack; *W. E. Johnson* and *Wm. Batchelder* for the respondent Clough.

There was error in permitting the cross-examination of Sargent as to the transactions in the United States Court. *Smith* v. *Castles*, 1 Gray 108; I Green. Ev. 515, note.

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The general rule precluding parties from impeaching their own witnesses applies to the State. *Dixson* v. *State*, 86 Ga. 754; *Com.* v. *Welsh*, 4 Gray 535; *Com.* v. *Hudson*, 11 Gray 64.

Evidence of Sargent's conviction of selling liquor contrary to law was inadmissible, because the crime is not one which involves moral turpitude. V. S. 1245; *Redway* v. *Gray*, 31 Vt. 292, 298; *State* v. *Hodgson*, 66 Vt. 144.

J. G. Harvey, State's Attorney, and *W. W. Stickney*, for the State.

ROWELL, J. The State, in its opening, called Orson Sargent as a witness, to prove flight. The prisoners called him in defense, to prove innocence. On cross-examination, to impeach him, the State was allowed to ask him if he was not convicted in the United States Circuit Court for selling liquor without a license, and he said he was not, that he settled it, but could not tell just how it was done. The State was also allowed, for the same purpose, to introduce a copy of the record of his conviction in 1883 for selling liquor contrary to law, and to prove by him that he was the person convicted.

Before said copy of record was offered and Sargent inquired of concerning it, the prisoners, on cross-examination of the State's witness Armstrong, had shown by him without objection that he had been convicted at that term of selling liquor contrary to law. They had also offered in evidence a copy of the record of his conviction of a similar offense at Norwich, which was objected to but admitted.

It was competent for the prisoners to show by Armstrong, as they attempted to do, and nearly if not quite did, as tending to show that he had a grudge against them, that he knew that they or one of them testified against him before the grand jury when he was indicted for selling liquor; and as no objection was made, they properly enough went

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further, and perhaps could have anyway, and showed his conviction, as that would naturally tend to displease him still more. Counsel for the State probably regarded it all as admissible for the purpose indicated, and so did not object to it.

But the same cannot be said of the conviction at Norwich. That was objected to, and it does not appear that the prisoners or either of them had anything to do with procuring it, so evidence of it could have been offered and received only for the purpose of impeaching Armstrong because of the conviction. After this was done under objection, the principal question is, whether the prisoners can object to the State's impeaching Sargent in the same way, provided it could impeach him at all.

They say that the State could not impeach him at all, save as allowed by statute, because it first called him, wherefore he was its witness throughout. This is the general rule, but the question is whether it is applicable to the State in a criminal case.

As reason is the soul of the law, the maxim is that when the reason of a law ceases the law itself ceases. Or, as *Willes*, C. J., puts it in *Davies* v. *Powell*, referred to in argument in *Morgan* v. *The Earl of Abergaveny*, 8 C. B. 786, "when the nature of things changes, the rules of law must change too." Now the reason of the rule that a party cannot impeach his own witness is, that by calling him in proof of his case, he represents him to be worthy of belief, and that to attack his general character for truth after that, would be not only bad faith to the court, but, in the language of Buller, would enable the party to destroy him if he spoke against him, and to make him a good witness if he spoke for him. But cases of what are called instrumental witnesses do not come within the rule, certainly not fully if at all, for there the reason of the rule fails, as the law compels the party to call such witness, and therefore they are the witnesses of the law rather than of the party, and

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it would be absurd to say that the party accredits a witness whom the law compels him to call; as absurd as *Chief Justice Willes* said in the case referred to, it would be to hold that deer were not distrainable when they had become a sort of husbandry, as horses, cows, sheep, and other cattle, because formerly they were not distrainable, as they were kept for pleasure and not for profit, and were not sold and turned into money as they were then.

In *Thornton's Executors* v. *Thornton's Heirs*, 39 Vt. 122, where it was held that a party calling a subscribing witness to prove a will could impeach him by showing prior contradictory statements, as the law compelled the party to call him, the court said that many, but not all, of the reasons for permitting that kind of impeachment applied to an impeachment of a general nature, but that the authorities had in many instances made a clear distinction between permitting an impeachment of the general veracity of a witness, and an impeachment by showing declarations of the witness inconsistent with his testimony, but decline to express an opinion as to the soundness of the distinction, but says that the fairness of holding a party estopped by reason of an act concerning which he has no choice, or by an indorsement that he does not make of a witness whom the law calls and makes current whether the party indorses him or not, may well be questioned. This strongly tends against any such distinction as the court says some of the cases make; and we think no such distinction can logically be made, for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fail in part and stand in part—fail as to one mode of impeachment and stand as to another mode—it is indivisible, and stands or falls as a whole.

This view is sustained by *Williams* v. *Walker*, 2 Rich.

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Eq. (S. Car.) 291: 46 Am. Dec. 53. There, in tracing the complainant's title, it became necessary to prove a mortgage. His solicitor stated to the court that the character of the attesting witness was such as not to entitle him to credit, and proposed to prove the mortgage by other testimony; but the court held that the attesting witness must be called, as he was at hand, and thereupon he was called, and testified that the mortgage was executed and delivered at a time subsequent to its date. The complainant then tendered testimony to impeach his general character, which was excluded, for that a party could not impeach his own witness. But the supreme court said that in the circumstances the complainant ought to have been allowed to show that the witness was undeserving of credit, referring to what Lord Ellenborough said in *The King* v. *The Inhabitants of Harringworth*, 4 M. & S. 350, that the testimony of a subscribing witness is not conclusive, for he may be of such a character as to be undeserving of credit, and then the party calling him may prove him such, and call other witnesses to prove the execution.

As the public, in whose interest crimes are prosecuted, has as much interest that the innocent should be acquitted as that the guilty should be convicted, we hold it to be the duty of the State to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light upon the transaction under investigation and aid the jury in arriving at the truth, whether it makes for or against the accused, and that therefore the State is not to be prejudiced by the character of the witnesses it calls. *State* v. *Magoon*, 50 Vt. 333; *State* v. *Harrison*, 66 Vt. 523.

This doctrine, carried to its logical result, exempts the State in criminal cases from the operation of the rule in question, and places it in the position of a party calling an instrumental witness, and for the same reason.

We are aware that in many, if not most, jurisdictions the rule is applied to the State in criminal cases, but it is upon the ground that the State stands like any other party, and

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accredits a witness by calling him; from which we infer that they do not hold, as we do, that the State is bound to call all witnesses, but is at liberty to choose, and to call whomsoever it will.

We are the more satisfied with the conclusion here reached, because we think the State ought not to be hampered by such a rule. Prosecutions are carried on by the Government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is, to faithfully execute their trust, and do equal right and justice to the State and to the accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentalities by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice, the State should be at liberty to remove it, and by trampling upon it if necessary.

But the prisoners further say that if the State was at liberty to impeach the witness, it could not do it by showing that he had been convicted of selling liquor, for that is not an infamous crime. But whether an infamous crime or not, the prisoners, against objection, were allowed to impeach the State's witness Armstrong in the same way, and therefore they cannot be heard to say that the State could not afterwards impeach in that way. This is a just application of the maxim that he is not to be heard who alleges things contradictory to each other; or, as Lord Kenyon once said, a man cannot be permitted to "blow hot and cold" concerning the same transaction, nor to insist at different times upon the truth of each of two conflicting allegations, according to the promptings of his private interest. Broom's Leg. Max. [*169]. Herman says that it has become axiomatic that a party must be consistent and not contradictory in the positions he takes, 2 Estop.

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§ 1040. This maxim is of pretty general application in the law. Thus, in pleading, repugnancy vitiates. A witness who contradicts himself is thereby discredited. When one professes to act in an official or a professional character, it is conclusive evidence against him that he possesses such character. So if a party takes advantage of, or voluntarily acts under, bankrupt or insolvency laws, he is estopped as against persons who are parties to the same proceedings, to deny their regularity, 1 Green. Ev. § 207, (5th ed.) Indeed this principle is the foundation of equitable estoppels generally.

It was held in *Morgan* v. *Couchman*, 14 C. B. 100, not to be competent for counsel, after making a stand upon a point of law, to fall back upon the evidence, and afterwards say that the matter ought to have been submitted to the jury. So where on a former trial a party's counsel, in his presence, put the case on ground wholly inconsistent with the party's present testimony, it was held competent for the other party to show that fact. *Nye* v. *Merriam*, 35 Vt. 438. When a party introduces irrelevant testimony without objection, he cannot object to the other party's meeting it, if it has a moral tendency to render a claimed fact more probable. *Lytle* v. *Bond's Est.*, 40 Vt. 618. See also *Gotleib* v. *Leach*, Ib. 278.

So when a defendant pleads double, for the purpose of drawing on the plaintiff to demur, he cannot on demurrer, shift his position, and say that one of the matters pleaded as a defense is no defense. *Wright* v. *Watts*, 3 Q. B. 89.

A party who calls and uses a witness on his own behalf, admits his competency, and cannot object to him on that ground when called by the other party. *Linsley* v. *Lovely*, 26 Vt. 123, 133.

It does not comport with the propriety of things that parties should be allowed to occupy inconsistent positions in the trial of cases. Courts would soon become just objects of ridicule under such a practice.

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As to the cross-examination of Sargent about his having been convicted in the Circuit Court, we do not think that the testimony elicited went beyond permissible bounds, though probably one of the questions was improper, for most of the authorities hold that the fact of conviction must be shown by the record. The modern tendency is to greater liberality of cross-examination for the purpose of finding out who and what the witness is. This is recognized in *State* v. *Fournier*, 68 Vt. 262, 270, where it is said that much latitude is allowed in cross-examining in regard to facts that bear directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, but that it rests largely in the discretion of the trial court how far the examination shall go. Mr. Justice Stephen lays it down as a general proposition that on cross-examination a witness may be asked any question that tends to shake his credit by injuring his character; but submits that the rule ought to be modified by adding that the trial court has a right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify.

This accords with Mr. Greenleaf's idea, and is probably the correct view, though it must be admitted that it is very difficult to draw the line with such precision as to make it easy in all cases to apply the rule thus modified, for in the realm of judicial discretion there is necessarily more or less doubt, notwithstanding, as Lord Coke says, that discretion is supposed to follow the right line of the law and not the crooked cord of public opinion, which some call law.

Judgment that there is no error in the proceedings of the county court, and that the prisoners take nothing by their exceptions. Let sentence be imposed and execution done.

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LAFAYETTE C. POWERS *vs.* NEW ENGLAND FIRE INSURANCE COMPANY.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Argumentative Averment Good on General Demurrer—Action on Insurance Policy for Benefit of Mortgagee.

The declaration set forth a contract of insurance which made the loss payable sixty days after proof, and alleged loss and proof. *Held*, sufficient, on general demurrer, as an argumentative averment of a promise.

An action to enforce a contract must be brought in the name of the one from whom the consideration moves and to whom the promise is made.

An action upon a policy of fire insurance payable to a mortgagee as his interest may appear, is properly brought in the name of the mortgagor for the benefit of the mortgagee to the extent of his interest, and the latter may control the judgment until his claim is satisfied.

ASSUMPSIT upon a policy of fire insurance. Heard upon a general demurrer to the declaration at the September Term, 1896, Windham County, *Start*, J., presiding. Demurrer overruled, declaration adjudged sufficient and, the defendant waiving his right to plead over, judgment for the plaintiff for the amount of loss and interest. The defendant excepted.

The declaration, after setting forth the policy, alleged, among other things, the loss and proof thereof to the company.

Butler & Moloney for the defendant.

The declaration is insufficient because there is no allegation of a promise.

The declaration is insufficient because the mortgagee is not a plaintiff. He should have sued alone or have been joined with the mortgagor. *Hanover Insurance Co.* v. *Brown*, 77 Md. 64: 39 Am. St. 389; *Trader's Insurance Co.* v. *Pacuad*,

150 Ill. 245: 41 Am. St. 355; *King* v. *Insurance Co.*, 7 Cush. 1: 54 Am. Dec. 683 and note; *Motley* v. *Insurance Co.*, 29 Me. 337: 50 Am. Dec. 591; *Hartford Insurance Co.* v. *Olcott*, 97 Ill. 439; *Coates* v. *Insurance Co.*, 58 Md. 172: 42 Am. Rep. 327; *Cone* v. *Insurance Co.*, 60 N. Y. 619; *Graves* v. *Insurance Co.*, 10 Allen 283; Jones, Mort. 408.

Clarke C. Fitts and *Waterman, Martin & Hitt* for the plaintiff.

The action is properly brought in the name of the plaintiff, for the benefit of the mortgagee to the extent of his interest. I Chitty, Pl. 12, 205; Dicey, Parties, 94; Gould, Pl. 196; *Teed.* v. *Elworthy*, 14 East. 210; *Fairchild* v. *N. East. Mut. Life Association*, 51 Vt. 613; *Fugure* v. *Mut. Society of St. Joseph*, 46 Vt. 362; *Hall* v. *Huntoon*, 17 Vt. 244; *Warren* v. *Batchelder*, 15 N. H. 129; *Smith* v. *Mudgett*, 20 N. H. 527.

TAFT, J. It is claimed that the declaration discloses no promise of the defendant to pay the plaintiff. The policy declared upon is set forth in words and figures, and shows a contract of insurance, the loss, if any, "to be paid sixty days after proof shall have been made." This at least is an argumentative way of alleging that the defendant promised to pay the plaintiff, and is sufficient as against a general demurrer.

Can the plaintiff maintain this action? The contract was made with him, the consideration moved from him, the promise was made to him, and the decisions in this State are, that a suit to enforce the contract must be brought in the name of the one to whom the promise is made, and from whom the consideration moves. *Fugure* v. *Mut. Society St. Joseph*, 46 Vt. 362. In *Davenport* v. *N. East. M. Life Association*, 47 Vt. 528, it was held that the beneficiaries could maintain the action, the court construing the contract as containing a promise to pay to them. Many cases from other states have been cited, but they are not authority

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here, and no reason is disclosed in any of them why we should overturn the well-settled practice and decisions of our own State.

A policy of insurance is sometimes made payable to the insured *and his assigns*, and sometimes to the mortgagee of the premises, naming him, and at other times, to anyone holding a mortgage upon the insured property at the time of the loss whoever he may be. The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property, provided it burns, thus letting the property go to the substantial owner, if the property is mortgaged, as is often the case, to its full value. But this interest of the mortgagee in the policy is an equitable, not a legal, one and will be protected in a law court. *Upton* v. *Moore*, 44 Vt. 552. If a policy is made payable to a mortgagee, the insurer is not at liberty to pay any sum due under the policy to the insured in disregard of the rights of the beneficiary. A policy of insurance is a mere chose in action; it is non-negotiable; it is not assignable at common law so that the assignee can sue in his own name; and though it may be payable to the insured *and his assigns*, still if a loss happens an equitable holder of the policy must sue in the name of the original insured. *Aldis*, J , in *Wood* v. *Insurance Co.*, 31 Vt. 552.

Under our system of pleadings,—and no better one has as yet been devised—the insurer cannot be subjected legally to any suit save one in the name of the party to the contract, and the beneficiary can always protect his rights by suit in the name of the insured.

This suit is brought, in accord with our system of pleadings, in the name of the party to the contract, for the benefit of the mortgagee, to the extent of its claim. This fact is alleged in the declaration in express terms.

The mortgagee has the right to control the judgment, and any execution issued thereon, until his claim under the policy

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is extinguished, after which the mortgagor (the plaintiff) is the only party in interest and of record. The judgment will be a complete protection to the defendant against any further suit in respect to all claims under the policy.

Judgment affirmed, with directions to the clerk to deliver any execution issued thereon to the beneficiary under the policy until its claim thereunder is extinguished.

H. N. JENNE *vs.* S. H. PIPER.

May Term, 1897.

Present: ROSS, C. J., ROWELL, MUNSON, START and THOMPSON, JJ.

No Need to Plead What Is Conceded—Wife as Witness—Evidence from Probability

The plaintiff in trespass on the freehold can take no advantage of the defendant's failure to plead a right of way, when he concedes on trial the existence of the right and the only dispute is concerning its location.

Upon the question where the plaintiff had located the way of necessity, it was admissible for the defendant to show where the plaintiff had said he intended to locate it, and where it had been used by the defendant, and others visiting his premises, with the knowledge and without the objection of the plaintiff.

The court properly refused to permit the wife of the plaintiff to testify, for the general rule excluded her and the plaintiff did not offer to show that she came within the exception.

TRESPASS ON THE FREEHOLD. Plea, the general issue. Trial by jury at the May Term, 1896, Windsor County, *Tyler*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

Gilbert A. Davis and *Sanford E. Emery* for the plaintiff.

W. W. Stickney and *J. G. Sargent* for the defendant.

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Ross, C. J. On the trial, the plaintiff conceded that the defendant had a right of way of necessity across the premises, where the alleged trespass was committed. This concession relieved the defendant from the necessity of pleading it. He need not plead what he need not prove. He had no occasion to prove that he had a right of way across the premises when the plaintiff conceded that he had. The court had no occasion to admit, and admitted no testimony to establish that the defendant had such a right of way. The exceptions do not raise the point made by the counsel for the plaintiff that a right of way, or license must be specially pleaded when relied upon by the defendant to justify the alleged trespass. Such plea is only necessary when the defendant has to establish such a right of way; or license, by proof, to make out a justification. The exceptions show that no proof was offered by the defendant to establish that he had a right of way across the premises, but that the fact that he had it was conceded by the plaintiff. There is no foundation for the contention that there was error because the defendant must have pleaded a right of way, or license, to justify his walking across the plaintiff's premises. The plaintiff conceded that he had that right. The only contention on the trial, made by the testimony offered, was with reference to the location of the defendant's right of way. Where one has a right of way of necessity across premises owned or occupied by another, unless he waives it, the other has the right to fix the location of the way, provided it is reasonably convenient for the use of the one having it. The testimony of both parties, so far as shown by the exceptions, was to the point that the plaintiff had exercised this right, and located the right of way. The plaintiff's testimony tended to show that he had located it on the east side of the tenement house, and the defendant's testimony tended to show that the plaintiff had located it on the west side of the tenement house. This same way would accommodate other lots owned by the plaintiff's wife

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in the immediate vicinity of the lot sold to the defendant's wife, on which he had erected a dwelling, and was residing. On this contention in regard to which party was right as to the location made by the plaintiff, of the way, either party had the right to introduce any fact or circumstance which would render his claim in regard to its location more probable. To establish his claim the defendant could show, as he did, that the plaintiff had said to others when speaking of selling the other lots, that the way was to be on the west side of the tenement house. Such declarations although made before the sale to the defendant's wife, could be shown as they tended to render it more probable, that at the time of the sale to the defendant's wife, he located the way where he had before said he should locate it to accommodate this and his other lots. The use of this way, without objection on the part of the plaintiff, and with his knowledge, by the defendant, and by others who had occasion to go to the defendant's house, was clearly admissible on this contention. These principles cover all the testimony admitted against the plaintiff's exception.

The court properly refused to allow the plaintiff's wife to testify. She could only do so in matters in which she acted in the premises, as the agent of the plaintiff. In offering her to testify in his behalf, the plaintiff did not offer to show that he ever authorized her to act in the matter for him, or ever recognized her as his agent in that matter. Being incompetent on the ground of public policy because of the marital relations existing between her and the plaintiff, except when she acted as his agent, the agency must first be shown to render her competent to testify in his behalf.

Judgment affirmed.

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ABBIE L. REDDING, apt., *vs.* MOSES W. REDDING'S ESTATE.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Handwriting—Opinion—Note—Evidence of Consideration—Similar Offenses—Standards of Comparison.

The question being whether the notes in suit were signed by the testator, the opinion of one acquainted with his handwriting that they were signed by him, was relevant.

One is deemed to be acquainted with the handwriting of another when he has seen him write, or when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into his business transactions as to induce a reasonable presumption and belief of their genuineness; or when in the ordinary course of business documents purporting to be written or signed by that person have been habitually submitted to the witness.

The words, "for value received," contained in a promissory note, are themselves evidence of a consideration, if the note be found to be genuine.

There was no evidence of a consideration in the fact that the maker, being under no legal obligation to the woman from whom he had been divorced, still entertained for her a lingering regard and frequently expressed an intention to provide for her, nor in the fact that immediately after the execution and delivery of the notes he said to another that he had settled with her, for in the circumstances the words plainly meant nothing more than that he had closed the matter.

There being no evidence of a consideration outside the notes themselves, the court erred in submitting the case as if there were.

As repeatedly declared, this court will not consider objections to testimony which were not raised in the court below.

As bearing on the question whether the testator executed the notes to the plaintiff, it was admissible to show that he expressed an intention to do so as well as that he admitted having done so.

When the nature of an offense is such that its commission carries with it an implication of criminal intent, proof of other similar offenses by the

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accused is not admissible for the purpose of showing that he committed the offense in question.

Forgery is of such a nature, and therefore the court rightly excluded testimony relating to forgeries by the plaintiff other than of the notes in suit.

As corroborating the plaintiff's claim, testimony was admissible that the notes were seen in her hands soon after their date.

The court did not err in admitting as standards of comparison exhibits found to have been written or signed by the testator, though some were unsigned and some undated and some were written before the testator's health began to fail and his hand to change as it did before the date of the notes in question.

APPEAL from an order of the Probate Court for the District of Franklin, accepting the report of commissioners upon the estate of the appellee disallowing the claim of the appellant. Declaration in assumpsit, with specification of two notes, each for twelve hundred dollars, dated December 11, 1891. Plea, the general issue, with notice denying the execution of the notes and the genuineness of the signatures. Trial by jury at the April Term, 1896, Franklin County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The answers to direct interrogatories 12 and 13 in Roe's deposition, to the admission of which the defendant excepted, were, in substance, that the testator at different times expressed to the witness his intention to provide for the plaintiff by giving her his notes to the amount of two thousand, two thousand five hundred, or three thousand dollars, and afterwards informed the witness that he had given her notes, without stating their amount.

The answers to cross-interrogatories 8 and 15 in the same deposition were to the effect that the witness learned from conversation with the plaintiff and the testator at the time of the divorce proceedings in New York that the cause assigned was the plaintiff's adultery with one Bigelow and that Bigelow admitted his guilt. In his answer to cross-interrogatory 16 the witness denied hearing the plaintiff say that Bigelow was a fool to admit it, and in his answer

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to cross-interrogatory 17 denied having stated otherwise, to his knowledge, in an affidavit used in the New York litigation. To the exclusion of these answers the defendant excepted.

C. G. Austin and *Wilson & Hall* for the defendant.

Farrington & Post, H. A. Burt, Ballard & Burleson and *D. W. Steele* for the plaintiff.

ROWELL, J. The question being whether the notes in suit were signed by the testator, the opinion of one acquainted with his handwriting that they were signed by him was relevant.

One is deemed to be acquainted with the handwriting of another person when he has seen him write, though but once, and then only his name; or when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting, and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or when in the ordinary course of business documents purporting to be written or signed by that person have been habitually submitted to the witness. Stephen's Dig. Ev. Art. 57; I Greenl. Ev. § 577; I Whart. Ev. § 708; *Patterson*, J., in *Doe d. Mudd* v. *Suckermore*, 5 Ad. & E. 703.

The testimony brought the witness Stranahan fully within this rule; therefore the court properly found therefrom that he was sufficiently acquainted with the handwriting of the testator to render him competent to testify his opinion of whether or not the notes in suit were signed by him.

The notes were properly admitted in evidence, notwith-

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standing the objection that there was no evidence in the case to show that they were given for a consideration; for, as the court held, the words, "for value received," therein contained, were themselves such evidence, if the notes were found to be genuine. *Stevenson* v. *Gunning's Est.* 64 Vt. 601, 614.

If there was any other evidence before the jury tending to show consideration, it is contained only in this: The plaintiff was once the wife of the testator. After living together eight years in New York City, he there obtained a divorce from her on the ground of adultery. Two years thereafter, in 1888, he married another woman, with whom he lived till his death in 1892. Soon after this marriage, the plaintiff commenced proceedings against him in New York, to annul and set aside said decree of divorce, for that it was obtained by fraud and perjury and without her knowledge; and prayed that a divorce be granted to her, and for alimony. At about the same time she brought a bill in chancery against him in Franklin County in this State, setting forth her proceedings in New York, and praying that he be enjoined from disposing of his property here pending the litigation there, and that the same be ultimately decreed to her; and an injunction was granted accordingly.

The litigation in New York was vigorously prosecuted, and terminated disastrously to the plaintiff in the summer or fall of 1891, and the bill in chancery in Franklin County was dismissed by agreement, with costs, which the plaintiff paid, by her attorneys, on December 8, 1891, three days before the notes in suit bear date.

After the granting of the divorce in 1886, the plaintiff returned to Vermont, her former home, and resided with her parents on a farm in Highgate owned by the testator, who continued his business in New York, but spent his summers in Vermont. He returned to New York in the latter part of November, 1891, and remained there till the next spring, when he returned to Vermont, where he soon died.

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The testimony on the part of the plaintiff tended to show that she went to New York on or about November 28, 1891, and that on the 11th day of December following, the testator executed and delivered to her the notes in suit. She introduced one Rawson as a witness, who testified that on said last-mentioned day, he accompanied the testator at his request, to a *café* in New York, where he found the planitiff, sitting at a table; that the testator left him two or three tables away, and went and sat at her table, where he remained fifteen or twenty minutes, and where the witness saw him write and deliver to the plaintiff the notes in suit, but saw nothing else pass; that thereupon he and the testator left the *café* together, and when upon the street the testator said: "I have settled that matter. Now that woman is taken care of;" that in response to an inquiry by the witness, he further said: "Well, I didn't give her what I promised you; I could not afford it; I made her two notes of twelve hundred dollars each, for one year and two years." The witness further testified that the testator had previously told him that the plaintiff deserved at least five thousand dollars, because she had earned it.

The plaintiff introduced other testimony tending to show that often, from the time of the divorce to his death, the testator manifested a friendly regard for her, and frequently said that he intended to make provision for her, as she had been his wife and was kind to him, that she should not come to want, and talked about different ways of making such provision.

There is absolutely nothing in all this that tends to show consideration; but on the contrary its tendency is to show that these notes were a mere gratuity, executed for the purpose of satisfying what the testator seemed to regard as a moral obligation resting upon him to make provision for the woman who had been his wife, and for whom, in spite of her faults, as judicially determined, he still had a tender eeling and a lingering regard.

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There is nothing in the word "settled," found in the testator's statement to Rawson, "I have settled that matter," that is, in the circumstances, suggestive of a consideration; for it is manifest that the word was not used in the sense of *paid*, but only in the sense of having brought the matter to a conclusion. This is all the more manifestly so when we consider, as we must, that there is nothing in the case to show that the testator was under any legal obligation to the plaintiff at any time after the divorce.

Indeed the plaintiff's counsel do not claim in their brief that there was any evidence to show consideration except the notes themselves. They did, it is true, suggest in argument that the dismissal of the bill in chancery may have constituted a consideration. But this is mere conjecture, and not very well founded at that, seeing that that suit could no longer serve the plaintiff, and that she paid the costs.

But the plaintiff's answer to the defendant's exception to the charge on the subject of consideration is, that although the defendant claimed on trial that there was no consideration, it introduced no testimony tending to support its claim, wherefore the court might well have told the jury that if it found that the notes were genuine, as upon their face they imported a consideration, and as there was no testimony to contradict that import, the plaintiff was entitled to recover, and that therefore if the court did err in charging that the jury might consider certain other evidence on the question of consideration, it was harmless. But the trouble is, there was no other evidence that tended to show consideration, whereas the court submitted the case just as though there was, which was error, and manifestly not harmless, and that was the point of the defendant's exception. Thus, the court told the jury what, in law, constitutes a valuable consideration, namely, a right, an interest, a profit, or a benefit to one party, or a forbearance,

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loss, or responsibility given or suffered by the other party, and then went on to say, that while the notes on their face purported to have been given for a valuable consideration, yet that was not conclusive, but the jury must consider all the evidence in the case bearing on the question of consideration, that tending to show consideration as well as that tending to show no consideration, and must consider not only the notes themselves, but the testimony of what the testator said about his relations with the plaintiff and what he intended to do for her; must consider whether there was any obligation existing on his part to give her anything, and what was done at and about the time the notes were executed, and also, the testimony upon the subject of what seemed to pass between them, or the want of anything passing between them, on that occasion.

This was misleading. The jury might have understood from it, and most likely did understand, that if the testator's relations with the plaintiff were friendly, and he had frequently said he was going to make provision for her, both of which the testimony on her part tended to show, that that was evidence tending to show an obligation on his part and consideration, which was not such evidence, in the circumstances, as we have said.

Then as to what the court said about the jury's considering the testimony on the subject of what seemed to pass between the plaintiff and the testator, or the want of anything passing between them, when the notes were given. If this means, as we construe it to mean, inasmuch as the court was then addressing itself solely to the question of consideration, that the passing or not passing of that something would tend to show or not to show consideration, as the fact was found to be, it was misleading; for the testimony does not show that anything then passed or seemed to pass but the notes themselves, and the only witness who testifies to what took place on that occasion says that he saw nothing else pass.

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Against the objection of the defendant on the sole ground that it was out of time, the court, as matter of discretion, allowed the plaintiff to show in rebuttal that the testator had frequently said he intended to make pecuniary provision for her.

The discretionary action of the court nullified that objection, but it is now objected that the testimony was not relevant to show consideration. This is kicking "against the goad," for it has been decided over and over that in this court the party excepting to the admission of evidence is confined to the precise objection made below.

The answers to direct interrogatories 12 and 13 in Roe's deposition were properly admitted, as they tended to show that the testator gave the notes. Direct interrogatory 23 elicited nothing but the repetition of an admissible statement made in answer to interrogatory 12.

Cross-interrogatories 8, 15, and 16, and the answers thereto, were properly excluded, as they concern immaterial matters. Cross-interrogatory 17 and the answer thereto were also properly excluded, as it was an attempt to contradict the deponent in respect of said immaterial matters, which the cross-examiner could not do.

When the nature of an offense is such that its commission carries with it an implication of criminal intent, proof of other similar offenses by the accused is not admissible for the purpose of showing that he committed the offense in question. *Strong* v. *The State*, 86 Ind. 208: 44 Am. Rep. 292; *State* v. *Lapage*, 57 N. H. 245: 24 Am. Rep. 69; *Commonwealth* v. *Jackson*, 132 Mass. 16.

Forgery is of such nature, and therefore the court rightly excluded cross-interrogatories 42 and 43, and re-cross interrogatories 1, 2, 3 and 4, as they related to forgeries by the plaintiff other than of the notes in suit.

Cross-interrogatory 44 sets out in full a long affidavit given by the deponent for use in the proceedings to set aside the decree of divorce, and the defendant claims that it has a

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direct tendency to contradict and impeach the deponent; but as counsel point out nothing as having such tendency, and as we see nothing having it as to anything material, we hold that there was no error in excluding the question.

The testimony of Jennison, that he saw the notes in the hands of the plaintiff soon after their date, was relevant, as bearing on the question of their earlier existence, and therefore corroborative of the plaintiff's claim in that behalf.

The exceptions to the exclusion of questions to Rawson concerning articles in certain New York newspapers and an article in the St. Albans Messenger, have not sufficient substance to merit discussion.

The question to Rawson about his advising the testator in the latter's office not to see the plaintiff, who was in the city, was irrelevant, and properly exclued.

The evidence tended to show that from 1889 the testator's health was poor, and that his handwriting materially changed. The plaintiff offered divers exhibits in evidence as standards of comparison of hands. To some the defendant objected that they bore no date; to some, that they were written before 1889; to some, that they bore no signature; to some, that there was nothing to show when they were written; and to some, without stating the ground, as far as appears. The court found that they were all written or signed by the testator, and admitted them, in which no error is apparent.

The fact that the testator's hand materially changed from 1889, went only to the weight of the standards written or signed before that time, not to their competency. That some bore no date, did not render them inadmissible, and it does not appear that there was nothing to show when they were written. Nor was it a valid objection that some bore no signature, as they were written by the testator, for that made them competent standards, especially as plaintiff claimed that the bodies of the notes in suit were written by him.

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The petition for a new trial on the ground of surprise and newly discovered evidence is not sustained.

Judgment reversed, said petition dismissed with costs, and cause remanded.

JULIUS BARRETTE *vs.* LAURIER & OUIMETTE.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Auditor's Report—Exceptions.

The auditor first reported that a part of the account was chargeable to only one of the defendants, but how much he was unable to find, and allowed the whole account against both. On recommittal, he reported that he was unable to find any item that was not chargeable to the defendants jointly. *Held*, that this nullified the first finding and left both defendants liable for the whole.

Objections to the report, as against the evidence and for failure to comply with the order of recommittal, are not considered, since the questions do not appear to have been raised below.

BOOK ACCOUNT. Heard on report and supplemental report at the April Term, 1896, Franklin County, *Start*, J., presiding. Judgment for the plaintiff for the whole account. The defendants excepted.

E. A. Ashland and *H. N. Mott* for the defendants.

Dee & George for the plaintiff.

ROWELL, J. The plaintiff carried on the meat business, and the defendants were partners in the grocery business. Defendants had assignments of the wages of a number of railroad men, who traded with the plaintiff on the defendants' orders and pass-books. All of plaintiff's account is properly chargeable to the defendants jointly,

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unless some of it is for meat sold to the defendant Ouimette for his individual use. In his original report the auditor allowed the whole account, but found that some of it was for meat thus sold, but he could not tell how much nor identify any item. But in his supplemental report he says he is unable to ascertain that any item is for meat thus sold. This nullifies his former finding on that point, and leaves his allowance of the whole account to stand, and makes it equivalent to a finding that all the items of the account are for sales to others on the defendants' joint authority.

It is claimed that the auditor's finding concerning Ouimette's individual account is against the evidence, and that therefore the report ought to be set aside. It is also claimed that the auditor did not comply with the order of recommittal, and that therefore the report ought to be set aside. It is enough to say of these claims that it does not appear that the questions were raised below. The exceptions say that the case was heard on the report and supplemental report.

Judgment affirmed.

COURT OF INSOLVENCY, J. B. HOLLISTER, pros., *vs.* P. M. MELDON, et al.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Appeal Bond—Extent of Validity—Amendment of Statute—Messenger's Fees not Taxable Costs—Assignee May Prosecute Cost Bond.

A bond given in a legal proceeding is enforceable only so far as the law required security to be furnished.

A bond given in 1893, upon appeal by the debtors from an adjudication of

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insolvency, was not required to cover intervening damages, but only costs.

Under Acts of 1884, No. 125, messenger's fees are not taxable costs against insolvent debtors, but are payable out of the estate.

A statute which, by reference, adopts another statute, is to be read as though the latter had been incorporated in it. Hence, it is not altered by a later act amending the statute referred to.

The assignee is the party to prosecute a forfeited bond furnished by the insolvent debtors upon their appeal from the adjudication of insolvency.

R. L. 1810, 1870, 2273, and Acts of 1884, No. 125, construed.

DEBT on a bond given to the Court of Insolvency for the District of Manchester. The defendants filed a general demurrer. At the December Term, 1896, Bennington County, *Thompson*, J., presiding, the demurrer was overruled, the declaration adjudged sufficient and judgment rendered for the Court of Insolvency for the penalty and in favor of the prosecutor for three hundred dollars, being for the fees of the messenger pending the appeal in the insolvency proceedings paid by the prosecutor as assignee under order of the court of insolvency. The rulings and judgment were all *pro forma*. The defendant excepted.

P. M. Meldon and *G. E. Lawrence*, the defendants, *pro se*.

The assignee is not the party to prosecute the bond. He took no part in the proceeding upon the petition in the court of insolvency, or upon the appeal, and is not a creditor. He is a volunteer having no interest and alleging none in his declaration. *Probate Court* v. *Brainard*, 48 Vt. 620.

The statute did not contemplate that messengers' fees should be secured by the bond, and the bond is enforceable only to the extent to which it was required. *Probate Court* v. *Matthews*, 6 Vt. 269.

The statute requires no bond in a case like this; therefore it is entirely unenforceable. *Lyon* v. *Ide*, 1 D. Chip. 46.

The demurrer should have been sustained. *Probate Court* v. *Hull*, 58 Vt. 306.

Butler & Moloney for the plaintiff.

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Ross, C. J. The contention is in regard to the validity, or the extent of the validity, of the defendant's bond given to the court of insolvency. A creditor brought a petition to the court of insolvency to have S. F. Prince and J. F. Prince, partners, doing business under the name of D. L. Kent & Company, adjudged to be insolvent. They were so adjudged and from that adjudication appealed to the county court. For the prosecution of the appeal the bond in suit was given. It is conditioned to pay all intervening damages and costs occasioned by the appeal, if they should fail to prosecute the appeal to effect. They did so fail. Being given in a legal proceeding, it is enforceable only to the extent the appellants were required by law to furnish security for their appeal. *Probate Court* v. *Matthews*, 6 Vt. 269. The bond is dated June 8, 1893. The laws then in force on the subject were the Revised Laws of 1880, modified by Act 125 of the Session Laws of 1884 By R. L. § 1870 an appeal was allowed to the petitioning creditor, or to the petitionees, from the decision of the judge of the court of insolvency, "upon the question of the insolvency of the debtor, as is provided in this chapter for appeals from the finding of the judge to the county court." R. L. § 1810 provides for such appeals. Among others it contains this provision: "Security for costs shall be given by the party appealing as in cases of appeal from the probate court." On appeals from the probate court, the appellant was to give a bond conditioned for the payment of such costs, R. L. 2273. Act 125 of the Session Laws of 1884 is an addition to the law then in force in regard to such appeals. Section one provides "Before an appeal shall be allowed from any other decision," etc., of such court the person appealing shall give a satisfactory bond conditioned that he will prosecute his appeal to effect and pay intervening damages and costs occasioned by such appeal. This evidently means appeals from such decisions and judgments as the Revised Laws had made no provisions for; because, in § 3, it proceeds to

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enact: "The security required to be taken in section one thousand eight hundred and ten of the Revised Laws shall be for intervening damages and costs." R. L. § 1810 relates to appeals from the judge's allowance, or disallowancc of claims, and not to appeals from adjudications upon a petitioning creditors' application to have the debtors adjudged to be insolvent. Those appeals, as we have seen, were provided for in R. L. § 1870. This class of appeals are spoken of in §§ 4 and 5 of the act of 1884. Section 4 is to the effect that such appeals shall stand for trial in the county court at the term they are entered, and that the judgment of the county court shall be conclusive. Section 5 is, that after an adjudication of insolvency upon the application of creditors, if an appeal is taken, the court may appoint a messenger to take care of the person's property, "and the fees of such messenger shall be a part of the costs of the proceeding to be paid from the estate, if the decision of the court of insolvency is affirmed and to be paid by the petitioner if the adjudication is removed."

There can be no doubt that under the statutes cited, the defendants in this suit are holden on their bond for the payment of the costs of the appeal. This obligation arises from the reference in R. L. § 1870, to R. L. § 1810, whereby the appealing party is required to give security for such costs. But the reference in R. L. § 1870 to R. L. § 1810 is to it as it stands in the Revised Laws. The effect of such reference is to incorporate the provision in R. L. § 1810 in regard to the appealing party giving security for costs into R. L. § 1870. It does not refer to it as amended and enlarged by § 3 of the act of 1884. Endlich on Inter. of Statutes §§ 233, 492. Sutherland on Statutory Construction § 257. The latter says: "Such adoption does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." In support of this he cites several cases. Hence, when the bond was given the debtors were not required to give security for

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intervening damages, and this part of the condition of the bond was withont the authority of the statute, and not obligatory upon the defendants.

The plaintiff contends that § 5 of the act of 1884, making the messenger's fees a part of the costs of the proceeding relating to such appeals, obligates the defendants under their bond for costs to pay such fees. But that section in terms declares that if the decision of the court of insolvency is affirmed, such fees or costs shall be paid from the estate. There is no provision that such fees shall be a part of the costs taxable against the appealing debtor. Costs are not taxable against a party except when made so by statute. In this section it is clearly provided how such fees, or costs, shall be paid. If the adjudication is affirmed they shall be paid from the estate; if removed, by the petitioning creditor; and there is no provision by which the assignee of the estate can charge them over to the debtors as a part of the costs to be paid by them, if they fail to prosecute their appeal to effect. Hence we conclude that such fees, though denominated costs, are not taxable to the appealing debtors, and therefore not recoverable under this bond. The other costs attendant upon the appeal in the county court may be recovered in this action on the bond against the defendants. The assignee is entitled to all funds which belong to the estate for distribution. In his official capacity he was interested in whatever is recoverable upon this bond and properly allowed to prosecute it.

The pro forma judgment reversed and cause remanded to have the costs held recoverable ascertained and judgment rendered therefor.

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ALBERT SOWLES AND JENNIE P. SOWLES *vs.* MYRON W. BAILEY.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

V. S. 2143—Mandamus to Compel the Appointment of Commissioners.

By V. S. 2143, any person interested in matters of dispute therein described is entitled to have commissioners appointed, and if the judge of the court of insolvency refuses to make the appointment, mandamus will issue to compel him.

It is not necessary that the precise question to be submitted to commissioners should be pending before the judge for decision.

In the case at bar, however, one of the questions was so pending, for the relator had been cited before the judge for contempt in conveying certain property and this involved the question of title to the property.

In the court of insolvency the precision of the common law in pleading is not required, and it is sufficient if the application fairly apprise the court as to the matter upon which adjudication is sought.

PETITION to the Supreme Court for the County of Franklin for a writ of mandamus. Answer and testimony. The facts are stated in the opinion.

E. A. Sowles for the petitioner.

The statute is mandatory. V. S. 2143; *White* v. *Haskins*, 59 Vt. 555; *Sowles* v. *Flinn*, 63 Vt. 563.

Mandamus is the appropriate remedy. V. S. 1617, 1618, 1619; *St. Albans* v. *National Car Co.*, 57 Vt. 68; *Redfield* v. *Windom*, 137 U. S. 643.

Wilson & Hall for the petitionee.

The act is of a judicial nature, and its performance cannot be enforced by mandamus unless the statute has peremptorily directed it to be performed. The writ is never granted in doubtful cases. High, Extr. Rem. §§ 9 and 39; *Richards* v. *Wheeler*, 2 Aik. 369; *Free Press Association* v. *Nichols*, 45 Vt. 7.

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Albert Sowles had no interest distinct from that of his assignee, who represented him as well as the creditors.

The evidence shows that there was no dispute which called for the appointment of commissioners.

THOMPSON, J. This is a petition for a writ of mandamus against the petitionee, who is Judge of the Court of Insolvency for the district of Franklin, to compel him as such Judge to appoint three commissioners under V. S. § 2143.

The facts necessary for the decision of this case are as follows: The relator Albert Sowles is an insolvent debtor whose estate is in process of settlement in the court of insolvency for the District of Franklin. Disputes and disagreements exist between him and the assignees of his estate, and also between the relators and the assignees, in respect to the right and interest of the relators in certain real estate, debts and claims, which the assignees claim belong to the insolvent estate.

As a result of such disagreement, the assignees on October 1, 1896, preferred their petition to the court of insolvency setting forth that the relator, Albert Sowles, had conveyed by quit claim deed to the relator Jennie P. Sowles, a portion of said real estate in dispute, and therein praying to have him cited before said court to show cause why he should not be adjudged in contempt of court by reason of having made such conveyance, and for such other order and relief as to the court should seem meet. Thereupon the court of insolvency on the same day, issued its notice to the relator, Albert Sowles, to appear before that court October 7, 1896, at 10 o'clock in the forenoon, to make answer to the petition and to abide by the order of the court thereon. This notice was duly served upon the relator, Albert Sowles, and he appeared before the court, and such proceedings were had in the premises that the hearing was continued to March 29, 1897, at which time the relators filed their petition in said court, setting forth that they were

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"interested in the estate of Albert Sowles in insolvency * * *; that there were disputes and disagreements in regard to the allowance of claims or priority or amount of liens upon the estate of said debtor, or the debtor's interest in property exempt from attachment or other matters in difference, arising from the settlement of the insolvent estate, to wit, the title, liens, or claims of ownership of the real estate alleged to have been assigned to the assignees in August, 1886, being the lands and estate and lease-hold estate mortgaged to the Burlington Savings Bank, and the ownership of the claim against John E. Wright, known as 'the Wright contract,' and also the claims described in the alleged citations or motions to appear before the court as therein fully described, to which said claims the petitioners, one or all lay claim * * and alleged as coming before * the above court for hearing for decision; that some or all of those matters were then pending in proceedings in the court of chancery within and for the county of Franklin, having jurisdiction over the same;" and praying the court of insolvency to appoint three disinterested persons to act as commissioners to hear and determine the matters in dispute between the relators and the assignees, and to report to the court their findings in the premises.

Such proceedings were had on this petition, that on March 30, 1897, the court of insolvency refused to appoint such commissioners and dismissed the petition.

The citations referred to in the relators' petition for the appointment of commissioners, were the petition of the assignees in the proceedings for contempt and another petition filed in that court by the assignees on October 1, 1896, charging that the relator, Albert Sowles, as an insolvent debtor, withheld a large amount of property from the assignees, and therein describing the same, and praying to have him cited before the court to be examined under oath touching the matters mentioned in that petition. The assignees and Albert Sowles were in fact in dispute and

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disagreement in respect to his right and interest in the property and claims described in both petitions of the assignees and in regard to the property debts and claims mentioned in the petition of the relators to the probate court praying for the appointment of commissioners.

The petitionee contends that there was no matter in dispute that was before him for decision that justified the appointment of commissioners. He further contends that under the statute, a party is not entitled to the appointment of commissioners unless the precise question to be submitted to them is pending before the court for decision at the time application is made for their appointment.

Neither of these contentions can be sustained. V. S. § 2143 provides that, in cases of dispute or disagreement in regard to the allowance of a claim or priority or amount of liens upon the estate of the debtor, or the debtor's interest in a homestead or property exempt from attachment, or other matters in difference arising in the settlement of an insolvent debtor's estate, and coming before the judge for decision, the judge in his discretion may, and upon petition of the assignee or a creditor who has proved his claim, or *other person interested*, shall appoint three disinterested persons to act as commissioners to hear and determine the matter in dispute, and report to the court their finding in the case.

V. S. § 2145 provides for an appeal from the decision of such commissioners.

No provision is made for an appeal from a decision of the court of insolvency in matters embraced in § 2143, unless commissioners are appointed as therein provided. One purpose of this section is to provide for an appeal in such matters, and thus give the parties in interest an opportunity to have their rights determined by the appellate courts. Under the provisions of this section, any person interested in any matter therein described, and involved in the settlement of an insolvent estate, may apply to the court of insolvency

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to have commissioners appointed to determine the matter in dispute, and report to the court their finding, without regard to whether the precise question in issue is then pending before such court for decision. To hold otherwise might preclude parties so interested from an opportunity to have their rights determined in the manner prescribed by this section, unless the adverse party took action in the first instance, and would delay the settlement of the estate.

Again, the court of insolvency could not determine the question raised by the petition of the assignees to have the relator, Albert Sowles, adjudged to be in contempt of court, without determining the rights and interests of the relators in the real estate in question in that proceeding. If it was found that it belonged to the relators or either of them, and not to the assignees, he could not be adjudged to be in contempt by reason of having made the alleged conveyance. Hence, a question involving the dispute and disagreement in regard to that property between the relators and the assignees, was in fact pending before that court for decision at the time the relators petitioned for the appointment of commissioners.

It is contended that the relators' application for the appointment of commissioners does not contain a sufficient allegation in respect to what the questions, disputes and disagreements were, and that it contains no allegation that either of the relators were creditors of the insolvent estate or an assignee of such estate.

To entitle the relators to make such application, it is not necessary that they should be either a creditor or an assignee of the insolvent estate. It is sufficient that they are persons interested therein in respect to the matters embraced in V. S. § 2143. In the court of insolvency, the certainty and precision of the common law is not required in matters of pleading. It is sufficient if the petition or application fairly apprises the court as to the matter upon which an adjudication is sought. The allegations of the relators'

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application were sufficient in this respect. It is the duty of the court when such application is made to make such an investigation as will enable it to briefly state the matter in difference submitted in the commission issued to the commissioners. From the records and evidence submitted, it is clearly apparent that the judge would have had no difficulty in so doing in this case.

When a petition for the appointment of commissioners is made by an assignee or a creditor who has proved his claim or other person interested, the judge has no discretion in respect to making such appointment. The petitioner is entitled to have the same made as a matter of right. The statute is mandatory. On the petition of the relators, the petitionee should have appointed commissioners in accordance with the prayer of their petition.

The relators must therefore prevail in this proceeding.

It is ordered that a writ of mandamus issue commanding the petitionee forthwith to appoint three disinterested persons to act as commissioners to hear and determine all the matters in dispute between the assignees of the insolvent estate of Albert Sowles and the relators and each of them, in respect to the real estate, and all other property, debts, and claims, involved in the settlement of said insolvent estate, to report to the Court of Insolvency their findings in respect thereto. It is further adjudged that the relators recover their costs of the petitionee.

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W. P. JOHNSON *vs.* BOSTON & MAINE RAILROAD CO.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Mail Contracts—Meeting Points—Connecting Trains—Implied Contract—No Recovery by Volunteer.

The contract under which the defendant carried the United States mail required it, at "meeting points," to transfer to connecting trains the mail which was to be forwarded by such trains. *Held*, that a "meeting point" was one where the defendant's mail route met another, as established by the government, and not a station upon the defendant's route, separated by a half-mile from another mail route, although trains from the latter ran over said half-mile to the station, and there connected with, and received the mail from, the trains of the defendant.

The contract between the plaintiff and the government required the plaintiff to carry the mail each way between the Wells River post office and the defendant's railroad, and between the latter and the Woodsville post office, "including tranfers." *Held*, that the words quoted could refer only to transfers between the trains of the defendant and the trains of another connecting mail route.

The defendant's contract with the government required the defendant, also, to make these very transfers between trains, but the plaintiff having actually made them in the belief that he was bound so to do by his own contract with the government, cannot recover therefor from the defendant upon an implied contract, even were it held that his contract did not require him to make the transfers, for the service was not performed at the request or upon the credit of the defendant.

GENERAL ASSUMPSIT. Heard upon the report of a referee, exceptions thereto by both parties and the defendant's motion to recommit, at the December Term, 1896, Orange County, *Start*, J., presiding. *Pro forma* judgment overruling the exceptions and motion and for the defendant to recover its costs. Both parties excepted.

Smith & Sloane for the plaintiff.

John Young for the defendant.

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THOMPSON, J. (1) The contract under which the defendant carried the United States mails during the time in question, required it, at "*meeting points*," to transfer mails to be forwarded by connecting trains, to such trains. During that time, the mail route over the Concord & Montreal R. R., as established by the United States government, did not include the half mile of its track between Woodsville, N. H., and the union station at Wells River, Vt., at which point it connected with the road of the defendant, but all the regular mail trains of the Concord & Montreal R. R. run from Woodsville to the union station at Wells River where they exchanged mails to and from other trains entering that station, including the defendant's.

A part of the service for which the plaintiff seeks to recover consisted in transferring the mails from the defendant's trains to those of the Concord & Montreal R. R. at the union station. If the latter were connecting trains at a meeting point within the meaning of the defendant's contract for transporting mails, then it was its duty under its contract to make such transfers of mail. If the union station at Wells River was not such a meeting point, as between the mail trains of the Concord & Montreal R. R. and those of the defendant, it is not contended by the plaintiff, that it was the duty of defendant to transfer mails from its trains to those of the Concord & Montreal R. R. at the union station.

"*Meeting points*," as used in the defendant's contract with the government, must be construed to mean points where the defendant's mail route actually met and connected with other mail routes established by the government, and "connecting train," must be taken to mean a mail train connecting with another mail train at such meeting points. Hence the union station at Wells River, was not a meeting point for the defendant as to the mail trains of the Concord & Montreal R. R., the nearest point of whose mail route was at Woodsville, N. H., a half-mile distant from the

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union station. In law, this half-mile was effectual as a disconnection of the two mail routes, as it would have been had it been a hundred miles. The duty of the defendant under its contract, could not be enlarged by the fact that for its own convenience or for some other reason, the Concord & Montreal R. R. saw fit to run its mail trains to the union station over the half-mile of its track not included in its mail route, nor by the fact that the United States government did not object nor interfere to prevent it. Therefore the plaintiff cannot prevail on this contention, nor can he recover on this branch of the case.

(2) The union station at Wells River was a meeting point as to the mail route over the Montpelier & Wells River R. R. and its mail trains entering that station were connecting trains as to the defendant, and as between itself and the government of the United States, it was its duty to transfer mails to be forwarded on mail trains of that road, from its own trains to the mail trains of that road. The defendant does not claim but that such was the duty imposed upon it by its contract during the time in question, had the government seen fit to require it to make such transfers. The plaintiff made the tranfers of the mails from the defendant's trains to the trains of the Montpelier & Wells River R. R., during that time, and he claims to recover for such service on an implied promise from the defendant to pay him. During the entire period covered by this service, except the last nine days thereof, the plaintiff was under a contract with the government of the United States, at a stipulated price which was paid to him by the government, to carry the mails between the post office at Wells River and defendant's railroad and the post office at Woodsville each way, as often as required, *including transfers*. By the terms of his contract, he was to carry all mails, each way, between the defendant's mail trains and the two post offices named. If the transfer of mails required by plaintiff's contract, is limited to the defendant's mail trains and the two post

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offices specified, there is nothing left for the words, "including transfers," in his contracts of 1886 and 1887, respectively, to operate upon. But they are to be given a meaning, if the subject matter of the contract discloses anything to which this language is applicable. At the time these contracts were entered into by the plaintiff and the government, the mail trains of the defendant, the Concord & Montreal R. R., and the Montpelier & Wells River R. R., all entered the union station at Wells River, and required a transfer of mails to and from each other. In view of the fact that no particular mail train was named, and the further fact that in plaintiff's contract of October 5, 1893, with the government, the transfers were limited to "direct transfers between depots as often as required," his contracts prior to that date must be construed to include the transfer of all the mails to and from all the mail trains of the defendant, entering the union station. Such was the construction given to his contracts prior to Oct. 5, 1893, by both the plaintiff and defendant, and both acted under such construction during all the time in question. The last nine days of the alleged service by plaintiff accrued under his contract of the last named date. In his brief, he does not claim that he is entitled to recover for these nine days, if he is not entitled to recover for the residue of the time. The construction put upon his contracts, precludes his recovery on this branch of the case. It is no concern of his, if the government saw fit by its contract with him and its performance, to relieve the defendant from any duty imposed upon it by its contract.

(3). Were it to be held that the plaintiff was not acting within his contract in transferring the mails from the defendant's mail trains to those of the Montpelier & Wells River R. R., he cannot recover of the defendant for that service on the ground of an implied contract. Strictly speaking, it is incorrect to say that the law implies an agreement. The agreement, if there be one, though not fully expressed in words, is nevertheless a genuine agreement

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of the parties. "It is implied only in this, that it is to be inferred from the acts or conduct of the parties, instead of from their spoken words. The engagement is signified by conduct instead of words. But acts intended to lead to a certain inference, may express a promise as well as words would have done." *Bixby* v. *Moor*, 51 N. H. 402; *Rohr* v. *Baker*, 13 Oregon 350. An express promise differs from an implied promise only in the evidence by which it is proved. In Pollock on Contracts, p. 29, it is said: "Tacit proposals and acceptances must, like express ones, be communicated. If A, with B's knowledge, but without any express request, does work for B such as people as a rule expect to be paid for, if B accepts the work or its result, and if there are no special circumstances to show that A meant to do the work for nothing, or that B honestly believed that such was his intention, there is no difficulty in inferring a promise by B to pay what A's labor is worth. And this is a pure inference of fact, the question being whether B's conduct has been such that a reasonable man in A's position would understand from it that B meant to treat the work as if done to his express order. The doing of the work with B's knowledge is the proposal of the contract, and B's conduct is the acceptance." * * "When the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention." *Day* v. *Caton*, 119 Mass. 513. Unless the party benefited has done some act from which his assent to pay for the service may fairly be inferred, he is not bound to pay. *Chadwick* v. *Knox*, 31 N. H. 226; 64 Am. Dec. 329. As a general rule, *prima facie*, valuable, manual services, rendered by one person for another, the benefits of which are knowingly accepted and enjoyed by the latter, were not intended nor understood as a donation. Unless there is something in the relation of the parties, the nature of the services rendered, or other circumstances attending or

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surrounding the transaction to rebut this presumption, a contract to pay for such services will be inferred from the acts and conduct of the parties. *Hood* v. *League*, 102 Ala. 228. Such presumption may be rebutted by evidence showing the nature of the services, the relation of the parties or other circumstances, to be such as to preclude any inference that such services were to be paid for by the person sought to be charged therewith. 3 Am. & Eng. Ency. Law 861. The circumstances in the case at bar rebut any such presumption or inference. The contracts under which the plaintiff acted were fairly susceptible of the construction which he and the defendant put upon them, if that were not the correct construction. The defendant claimed and understood that it was the duty of the plaintift to make the transfers, and he knew or ought to have known as a careful, prudent man, under the circumstances, that the defendant so claimed and understood. The referee expressly finds that the plaintiff, while performing the service for which he seeks to recover, supposed that it came within the scope of his contracts. This precludes the idea that while rendering the service he expected the defendant would pay him therefor, or that the defendant knew or ought to have known that he expected pay therefor from it. Both parties then understood that the defendant was not to pay for such service.

The plaintiff understood that the government was to pay him and did the work on its credit. This precludes a recovery from the defendant. *Rohr* v. *Baker*, 13 Oregon 350.

It also appears that the defendant never requested the plaintiff to perform such service, and the evidence did not disclose that the subject was ever mentioned between him and any officer of the defendant before he commenced the work, nor while it was being performed, nor until he notified the defendant that he should no longer do it, and ceased to do it, October 15, 1893. After the plaintiff entered

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into his contract with the government in 1886, the defendant construing that contract to mean that plaintiff was to transfer all mails arriving at Wells River on the defendant's trains, discontinued making such transfers by its servants. The plaintiff was not called upon by the defendant nor by the government to make the transfers which the defendant had discontinued, but he, thinking that it might be his duty to make them, voluntarily proceeded to perform such service during the whole time in question. There was no such necessity for the plaintiff's interference, if he was not acting within his contract, as would authorize him to perform the service at the expense of the defendant, even though it were neglecting a duty under its contract. In this view of the case, he must be taken to be an officious volunteer, and therefore precluded from recovering. Keener on Quasi Contracts, 349, 350, 351; *Chadwick* v. *Knox*, 31 N. H. 226: 64 Am. Dec. 329.

Judgment affirmed.

ROLLIN AMSDEN *vs.* JOHN P. ATWOOD.

May Term, 1897.

Present: ROSS, C. J., ROWELL, MUNSON, START and THOMPSON, JJ.

Landlord and Tenant—Holding over—From Year to Year—Exception—Damages—Argument to Jury.

If a tenant for years, after the expiration of his lease, holds over for one full year and enters upon another, being treated by the landlord as a tenant, he becomes a tenant from year to year and is entitled to complete the year upon which he has entered, although he has not paid a full year's rent.

A landlord is not entitled to insist that his tenant shall discharge an employee upon the premises though personally offensive and uncivil to the landlord.

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An offer by the landlord to the tenant was properly held unavailing to the former because coupled with conditions which he had no right to impose.

An exception to a refusal to charge cannot be sustained unless the request was sound in every respect.

***Amsden* v. *Atwood*, 67 Vt. 290: 68 Vt. 332, approved.**

As bearing upon the question whether the plaintiff recognized and treated the defendant as his tenant instead of a trespasser after a given date, it was admissible to show by parol the course of business between them tending to show that their relations were the same after that date as before.

A landlord in the lease of a part of his mill contracted with the lessee to saw his logs at a price named. While the lease was in force he refused to saw and notified the lessee to vacate unless he accepted certain conditions which the landlord had no right to impose. The lessee vacated and was held entitled to recover as damages the value of the remainder of the term, as well as the loss which he sustained by having the logs left on his hands and being obliged to dispose of them otherwise.

Counsel, in argument to the jury, have a right to criticise the conduct of a party in the transactions in issue as bearing upon his credibility, where he has been improved as a witness in his own behalf.

General Assumpsit. Plea, the general issue and declaration in offset. Trial by jury at the May Term, 1896, Windsor County, *Tyler*, J., presiding. Verdict for the plaintiff for the amount claimed under the specifications and three special verdicts touching the amount of the defendant's damages in offset. Judgment for the defendant for the balance. The defendant excepted.

The plaintiff's notice to the defendant dated December 26, 1892, closed as follows: "And I further notify you that I am ready to saw your logs for chair stock commencing this morning."

The jury were instructed to find and state the amount of damages sustained by the defendant in the loss of the remainder of the term and returned a verdict of $200.87 as the value of the remainder of the term and the court allowed the defendant that sum in the judgment. The jury were instructed to consider in finding this verdict "what profit and advantages would have been to the defendant if he could have had his rights under the lease in respect of having his logs sawed, the quantity of logs on hand, the

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amount of chair stock which could have been manufactured therefrom, and the profit at which he could have done it." In respect to the logs themselves they were instructed to exclude any profit the defendant might have made on them but to find how much loss he suffered by having them left on his hands and being obliged to dispose of them otherwise. On the subject of the defendant's duty to make his damages as small as possible by diligence on his own part, the court charged as stated in the opinion. The defendant's damages on account of the logs were assessed at $125 and that sum was allowed the defendant in the judgment.

J. C. Enright and *J. J. Wilson* for the defendant.

Gilbert A. Davis and *Wm. B. C. Stickney* for the plaintiff.

THOMPSON, J. After the expiration of the indenture, reported in *Amsden* v. *Atwood*, 67 Vt. 292, the plaintiff, without objection, allowed the defendant to hold over from the date of expiration, to wit, November 1, 1891, to November 1, 1892, and from thence to December 26, of that year, when he gave him written notice that he regarded him as a tenant by sufferance; that the rent would be increased to $600 after January 1, 1893; that the charge for sawing logs would be increased, and that as a condition of defendant's continuing as his tenant he should not employ men who were personally offensive to the plaintiff. On this state of facts this court held that the defendant's holding over was such that at the time of the notice of December 26, 1892, he had become a tenant from year to year. *Amsden* v. *Atwood*, 67 Vt. 289; *Amsden* v. *Atwood*, 68 Vt. 332 The plaintiff now claims that the facts on which that holding was based, are different from those established in the last trial in the county court, in that it now appears that the defendant had paid the rent only to October 1, 1892; and that his failure to pay rent for a full year from November 1, 1891, prevented his tenancy from ripening into a tenancy from year to year. The plaintiff

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rendered to the defendant monthly statements of the sum due for rent and power, from November 1, 1891, to October 1, 1892, and the bills so rendered were paid the plaintiff by the defendant, from time to time, and all before November 1, 1892. By thus demanding and receiving rent, the plaintiff elected to treat the defendant as a tenant holding over under the terms of the written lease which had expired, instead of treating him as a trespasser. In the notice of December 26, 1892, the plaintiff recognized the fact that the defendant to that time had held as *a tenant*. It is not the payment of rent for a year, or any other definite time, that converts a holding over, from a tenancy at will into a tenancy from year to year, but the recognition by the landlord of a subsisting tenancy by the acceptance of rent or by some other act of recognition of the relation of landlord and tenant. This is clearly shown by the authorities cited and reviewed in *Amsden* v. *Atwood*, 67 Vt. 289. Hence there is nothing shown by the record to change the legal effect of the facts involved when the case was here before. The county court, therefore, correctly held that the defendant was a tenant from year to year, and rightly denied the plaintiff's requests framed in view of the contention he now makes. *Amsden* v. *Atwood*, 68 Vt. 332.

(2) The plaintiff had no legal right to require the defendant to discharge La Cross from his employment as a condition precedent to plaintiff's sawing defendant's logs, nor had he any right to impose any terms in respect to his employment of help as a condition to his future occupancy of the premises so long as he was legally in possession as a tenant from year to year. No rights in this respect were reserved to the plaintiff in the written lease nor by the implied terms of the tenancy from year to year. Hence the charge of the court on this branch of the case was correct.

(3) Plaintiff's offer to saw defendant's logs in the manner he had previously done, made in his notice of December 26, 1892, is to be construed as conditioned upon the payment

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of an increased price therefor, the payment of more rent, and the non-employment of persons offensive or uncivil to the plaintiff, by the defendant. The county court so construed it. Hence, plaintiff's exception to this ruling, cannot avail him.

(4) The plaintiff requested the court to instruct the jury that "it was not optional with the defendant to take down his machinery and vacate December 27, 1892, as he did, and claim his future damages for all his loss of profits and value of the lease for the unexpired term and the depreciation in the value of machinery, or either of said elements of damages, but it was his duty to have remained in possession, brought along his logs and had them sawed and tendered the price of sixty cents per hour and rent at $36.48 a month or $109.44 quarterly as stipulated in the contract of April, 1890, and if not accepted, let the court settle the amount legally due." This request applied to the defendant's declaration in offset, declaring for damages against the plaintiff growing out of his breach of the contract. The exceptions do not disclose what the charge in full to the jury was on the subject of this request, but assuming that the instruction as requested was refused, there is no error, unless the plaintiff was entitled to have the entire request complied with. The facts now disclosed in respect to this phase of the case, do not differ in legal quality from what they were when the case was here as reported in *Amsden* v. *Atwood*, 68 Vt. 332. It was then held the defendant was not bound to bring and tender the logs at plaintiff's saw, after he had imposed a condition as to his sawing them which he had no right to make, and that the refusal of the plaintiff to saw the logs except on such condition, was a breach of his contract with the defendant, which excused him from tendering the logs to the plaintiff to be sawed, as a condition precedent to his right of recovery for such breach. The defendant under the circumstances of the case was not bound to tender either the logs to be sawed or the price for sawing them, in order

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to enable him to recover for the plaintiff's breach of the contract. Hence this part of the request was unsound, and it was not error to refuse it. There is no occasion to consider the other matters embraced in it. *Vaughan* v. *Porter*, 16 Vt. 266; *Rea* v. *Harrington*, 58 Vt. 181.

(5) As bearing upon the question whether the plaintiff recognized and treated the defendant as his tenant instead of a trespasser, after November 1, 1891, it was admissible to show by parol, the course of business between them tending to show that their relations to each other as landlord and tenant were the same after that date as before it. Of this character was the parol evidence admitted, to which the plaintiff excepted, so far as pointed out by his brief.

(6) The defendant has recovered only for the value of the lease for the remainder of the term, and special damages in respect to thirty-eight cords of logs that were in the yard as stock at the time of the breach of the contract by plaintiff, as is shown by the special verdict. The charge properly instructed the jury in respect to the care and diligence the defendant was bound to exercise to prevent loss and damage to himself by reason of plaintiff's breach of the contract. In respect to the logs, it excluded the element of profit that might have been realized from manufacturing them into chair stock, and limited damages thereon to that arising from their being left on his hands as stock and his being obliged to dispose of them as best he could. This was a proper element of damages. So was the value of the remainder of the term, and both were properly submitted to the jury. 12 Am. & Eng. Ency. Law 697; *Eten* v. *Luyster*, 60 N. Y. 252; *Chapman* v. *Kirby*, 49 Ill. 211. There is no occasion to consider whether the charge to the jury was erroneous in respect to the other grounds of damage claimed by the defendant, as the special verdict cures such error, if there was any.

(7) The remarks of counsel for the defendant in his argument to the jury, to which the plaintiff excepted, were

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not of such a character as to be the subject of exception. They were confined strictly to the evidence in the case. He had a right to examine and criticise the conduct of the plaintiff involved in his relations with the defendant in the transactions in issue, as bearing upon his credibility as a witness, he having been improved as a witness in his own behalf.

Judgment affirmed.

RANSOM BEERS *vs.* B. W. FIELD.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Provision in Lease Insufficient to Reserve Lien.

A provision in a lease that the lessee shall not dispose of any produce grown on the premises until payment has been made of the rent and one-half of the taxes and the cows have been wintered through, is not sufficient to reserve a lien, and the produce may be attached as the property of the lessee.
McLellan v. *Whitney*, 65 Vt. 510 followed.

TREPASS AND TROVER for hay. Heard at the December Term, 1896, Addison County, *Tyler*, J., presiding, upon an agreed statement. Judgment for the plaintiff. The defendant excepted.

Cushman & Mower for the defendant.

W. H. Bliss for the plaintiff.

THOMPSON, J. The defendant leased to one Charles H. Merrill, for one year, a farm in the town of Ferrisburgh, upon which the hay in question was grown during the term of the lease. With the farm were also leased a number of cows.

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The rent reserved was two hundred and fifty dollars, and one-half the taxes. The lease provided that Merrill should not dispose of any of the produce grown on the farm until the defendant had received the rent and one-half the taxes, and the cows were wintered through. After the hay was cut and while it remained on the leased premises, it was taken upon a valid execution issued upon a judgment rendered against Merrill, in favor of this plaintiff, and Merrill's attachable interest therein was purchased by the plaintiff at the sale thereof on execution. The officer levying the execution, was duly notified by the defendant not to sell the hay. Merrill made no claim to any of the hay sold as exempt from attachment. Subsequent to the sale on execution, the defendant drew away the hay from the leased premises and converted the same to his own use; and for such taking this suit was brought. The defendant applied the value of the hay, viz., $86.10, upon the balance of the rent and taxes due him from Merrill, the latter, at the time of the taking of the hay by the defendant, consenting and agreeing to such removal and application.

With the exception of the hay so taken by the defendant, all the hay grown upon the leased premises during the term, was necessary for wintering the cows, and was consumed for that purpose. At the time of the sale on execution, Merrill owed the defendant on account of rent and taxes more than the value of the hay sold; and at the expiration of the term, he was owing him on account of rent and taxes after the hay taken by him had been applied in payment thereof.

The defendant contends that by the terms of the lease, he reserved a lien on the produce for the payment of the rent and taxes, and therefore had a right to take the hay and apply it as he did. The language of the lease on which the defendant relies as reserving a lien for his benefit is as follows: "Said Charles H. is not to dispose of any of the produce grown on said farm until the said Byron W. has

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received the rent, two hundred and fifty dollars, one-half of the taxes, and said ten cows are wintered through."

This case is not distinguishable in principle from *McLellan* v. *Whitney*, 65 Vt. 510. In that case, among other things, the lease provided that all grain raised on the place should be fed out thereon, and it was held that such stipulation did not create a lien for the benefit of the lessor on the grain so raised.

The stipulation in the lease from the defendant, that the lessee should not dispose of the produce grown on the farm until the rent and taxes were paid, and the cows wintered through, is no more effective to reserve a lien than would have been a provision requiring the same to be fed out on the farm. The effect of the lease was to vest in Merrill the absolute title to all the produce grown during the term.

The language of the lease on which the defendant relies is insufficient to reserve a lien in his favor on the produce.

By the purchase of the hay at the sale on execution, the plaintiff acquired title thereto, and the right of possession thereof, and therefore can maintain this action.

Judgment affirmed.

Taft, J., dissents.

EDGAR S. PIKE *vs.* SAMUEL PIKE.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER and START, JJ.

Statute of Frauds—Cause Retained for Further Decree—Specific Performance.

The statute of frauds, even though insisted upon in the answer, is waived by allowing the parol evidence to be received without exception.

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The cause being a proper one for specific performance, but not ripe for a complete decree, a partial decree was entered and the cause retained.

The parties made a contract in 1869 under which they operated until 1889, when, the circumstances having changed, they attempted to substitute a new contract but succeeded as to a portion, only, of the matter covered by the first. *Held*, that the original contract remained in force except so far as modified by the new one.

BILL IN CHANCERY. Heard upon bill, answer and master's report, at the December Term, 1896, Bennington County, *Thompson*, Chancellor. Decree for orator. The defendant appealed.

The master reported in substance as follows: The orator is a son and only child of the defendant and became of age August 25, 1869. In November of the same year he went out to work for a month. At that time his father owned and lived upon the farm described in the petition, then worth about four thousand dollars, and the orator's sister, Alma, was living at home, being in poor health and unlikely to live many years. While the orator was thus out at work the defendant asked him to come home and help carry on the farm, telling him that, if he would do so, when the defendant and his wife, the orator's mother, were through with the property, everything should be his, but that Alma must be cared for while she lived. The defendant then owned the farm, well-stocked and supplied with tools and free of incumbrance, but owed about three hundred dollars for a piece of land recently purchased. The orator relying upon the defendant's statement went home and for nearly twenty years thereafter worked faithfully and diligently in carrying on the farm; and his labor was worth twenty-five dollars a month. The defendant also worked faithfully. The orator was married in 1873 and has two children, one born in 1880 and one in 1884, and his family have been supported out of the proceeds of the farm. In 1873, the orator and the defendant built a new house upon the farm from their joint funds. Alma died in 1879 and the orator's mother in 1883. Until the spring of 1889, the defendant

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made all contracts and received all moneys and had the general management of affairs, the orator receiving from him whatever he had and accumulating nothing of his own. No writings had been made, or agreed to be made, until March, 1889, when the orator, ascertaining that the defendant was about to marry again, suggested to the defendant that writings should be executed. It was then agreed that the defendant should deed to the orator an undivided half of the farm, and give him a bill of sale of an undivided half of the personal property, not including debts due, money on hand or in the savings bank, and lease to the orator the defendant's half of the farm, to be carried on "upon the halves" so long as he should do so in a husband-like manner. The evidence was conflicting as to whether the defendant agreed to bind himself by writing that the orator should own the defendant's half of the farm at his decease. The defendant objected to executing such a paper, saying that the orator, as his only child would inherit it without a writing. This agreement is not found established. The deed of an undivided half of the farm and the bill of sale of an undivided half of the personal property were duly executed March 18, 1889, but the execution of the lease was postponed to another day, by reason of the lateness of the hour, and thereafter the defendant declined to execute it, and no other papers were made. The present value of the farm is about three thousand dollars. The defendant was married to his present wife April 27, 1889. On March 18, 1889, the orator and defendant owed nothing to outside parties and the defendant had in cash on hand, debts due, and deposit in the savings bank, about seven hundred dollars. When this petition was brought both families occupied the homestead, but the defendant soon afterwards moved away. From the spring of 1889 to the spring of 1891, the parties carried on the farm as tenants in common, each taking one-half of the products. In the spring of 1891, the defendant leased his half of the farm to

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the orator "upon the halves," and that arrangement has been continued ever since. The defendant is 79 years of age and somewhat broken in health. The house is fairly well arranged for two families, but the farm cannot be divided without disproportionate decrease in value.

The chancellor decreed specific performance of the agreement to lease and, further, that at the decease of the defendant the latter's title to his undivided half of the farm should vest in the orator, his heirs and assigns. The latter portion of the order is referred to in the opinion as paragraph 3.

Batchelder & Barber for the defendant.

Joel C. Baker for the orator.

Ross, C. J. The answer of the defendant has not been furnished. We are, therefore, not informed whether it sets up and relies upon the statute of frauds as a defense. If it does, the defendant has waived it by allowing the contract of 1869 and the unexecuted part of the contract of 1889 to to be proven by parol testimony without exception. As applicable to these contracts, that statute does not render them void nor unenforceable if allowed to be proven by testimony, not in writing signed by the party to be charged. *Montgomery* v. *Edwards*, 46 Vt. 151; *Strong* v. *Dodds*, 47 Vt. 354; *Battell* v. *Matot*, 58 Vt. 271; *Scofield* v. *Stoddard*, 58 Vt. 290. The solicitor for the defendant does not insist upon the statute as a defense. The orator is therefore entitled to have the contract of 1889 specifically enforced. This affirms the decree in regard to the lease of the half of the farm to which the defendant retained the title.

The solicitor for the defendant contends that the contract of 1889 merged the contract of 1869. There is no contention that it did not so far as it went. The orator contends that it did not embrace all that was contained in the contract of 1869. By the latter contract the defendant agreed that if the orator would come home and help carry on the farm, the orator should have all the property when

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the defendant and his wife were through with it, except that his sister, Alma, who was in poor health, and not expected to live long, must be cared for while she lived. The orator entered upon the performance of this contract and fulfilled his part of it for nearly twenty years. In the meantime the sister and his mother, the defendant's wife, had deceased. The property had been added to. The defendant had become advanced in years, and was about to marry. The orator was the defendant's only child and heir, and would, as heir take all the property, if the defendant did not marry again and died without making a will. Up to this time the defendant had controlled all of the property and made the contracts in regard to it. There had never been any agreement in regard to making writings of any kind. Nevertheless, the understanding and agreement of 1869 necessarily involved that the defendant, his wife and daughter should be supported out of the property and their joint earnings, and that the defendant beyond using what was fairly needed for his support and that of his wife and daughter, would do no act which would prevent the residue of the property from coming to the orator at his decease, and would do everything necessary to have that residue vest in the orator. During this time the house on the farm had been rebuilt, and the orator with his family occupied one part, and the defendant another part of it. The contemplated marriage of the defendant was an act which might defeat the property which would remain at the decease of the defendant, or some portion of it, from coming to the orator by heirship. If the defendant's wife should survive him she would, under the law, take more or less of the property. The orator, fearing this, solicited the defendant to execute such writings as would effectuate their contract of 1869. Their negotiations resulted in the defendant's giving the orator a deed of the undivided half of the farm and a bill of sale of an undivided half of the personal property excepting debts due, cash on hand or money in the savings bank, and agreeing to execute a lease

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of the other half of the farm and personal property to be carried on by the orator "upon the halves" so long as he should carry it on in a good husband-like manner. There was not time, that day, to have the lease drawn and executed. Subsequently the defendant declined to execute it. The decretal order compels the execution of the lease. As we understand the findings of the master, the defendant was to have, as his own, the debts due, cash on hand and in the savings bank amounting to seven hundred dollars, and was also to have one-fourth of crops and income of farm and personal property conveyed and leased, as his own, freed from the provisions of the contract of 1869, except that this property was to be used for the support of himself and contemplated wife. The orator urged the defendant to give him a deed of the leased half of the farm and a bill of sale of the leased half of the personal property to take effect at the decease of the defendant, or, some writing which would accomplish that purpose. The defendant said, such a writing was needless because the orator was his only child, and this property would all be the orator's at his decease, without any writing. No agreement was reached in regard to this property. It is manifest that the parties did not take the property agreed to be leased out of the operation of the parol contract of 1869, for they came to no agreement in regard to it. The decretal order adjudges that the orator is entitled to it at the decease of the defendant, and that the title thereto shall then vest in the orator, his heirs and assigns. We think this order too broad. It impliedly, at least, prohibits the defendant from raising money on it for his own support if it should be needed for that purpose. The conveyances, and the lease, if the orator shall carry on the leased property in a good, husband-like manner, release the orator from doing more to help the defendant manage and carry on the property. But if the orator should fail to carry on the leased property in a husband-like manner, then the lease becomes void, and under the contract of 1869 the orator would be under an obligation

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to help the defendant carry on and manage it. If the orator fulfills the conditions of the lease, or, failing that, fulfills the contract of 1869 in regard to helping the defendant, in carrying on and managing the property covered by the lease, he will, unless the defendant shall need to use some of it for his proper support according to his condition and rank in life, be entitled to the property covered by the lease. At the present time, this portion of the property is hedged about with so many contingencies, that it is not ripe for a decree. But the court of chancery having properly taken the case in hand for compelling specific performance of the agreement in regard to the lease, considering the age of the defendant, and the fact that he has married, and his wife may outlive him, will hold the case to give such relief in regard to the property leased as the orator may be equitably entitled to, under the contract of 1869 modified by the contract of 1889, at the decease of the defendant. By the two contracts, it was contemplated that the defendant might occupy the part of the house he was occupying when the agreement of 1889 was made. As that agreement contemplated his marriage, he should be allowed with the seven hundred dollars surrendered to him and the fourth of the crops of the farm and income of the personal property reasonably to support himself and wife during his life, even if he should have to raise some of the means out of the property leased. If his wife should first decease, he might need the personal care of the orator. Such care was contemplated by the agreement of 1869, and not relinquished by the contract of 1889.

The decree of the court of chancery is reversed as to the paragraph numbered 3 and confirmed as to other portions. The cause is remanded with a mandate, to hold the case in regard to the property embraced in paragraph 3, in accordance with the views herein expressed, and at the decease of the defendant to enter such a decree in regard to the property embraced in this paragraph as equity may require.

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C. J. UFFORD *vs.* CHARLES WINCHESTER.

May Term, 1897.

Present: ROSS, C. J., ROWELL, MUNSON, START and THOMPSON, JJ.

Lien Holder Giving License to Sell—Sham Sale—Payment of Proceeds.

The plaintiff, holding a conditional vendor's lien upon a horse, licensed the vendee to dispose of the horse in any way and at any price he might see fit, and give the plaintiff the proceeds. The vendee claimed to have sold the horse to his brother, and the brother sold it to the defendant, who knew the terms of the license. *Held*, that the court was correct in charging that if the claimed sale by the vendee to his brother was a sham trade the defendant, although an innocent purchaser, was liable to the plaintiff in trover; but that the court erred in charging that even if that sale was genuine the defendant was bound to see the proceeds paid to the plaintiff.

As the verdict was general and may have been rendered upon the erroneous instruction the judgment must be reversed.

White v. *Langdon*, 30 Vt. 599, distinguished.

TROVER for a horse. Plea, the general issue. Trial by jury at the February Term, 1897, Orleans County, *Taft*, J, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

N. A. Norton and *E. A. Cook* for the defendant.

W. W. Miles for the plaintiff.

THOMPSON, J. January 9, 1892, the plaintiff sold to one Burton D. Piper, the horse in question, with other property, by a conditional sale, reserving a lien thereon to secure the payment of the purchase price. The lien was duly recorded, and no question was made as to its validity. November 14, 1894, the plaintiff gave said Piper consent in writing to sell this horse, which consent was as follows: "I hereby give B. D. Piper leave to dispose of the Phillips horse on which I have a lien on, in any way he sees fit, and at any price he sees fit, and give me the proceeds, be it more or less."

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The evidence of the defendant tended to prove that under this license, Burton D. Piper sold the horse to his brother, Alton J. Piper, and that subsequent to such sale, the defendant, knowing the contents of the license to sell, bought the horse of Alton J. Piper for fifty dollars, giving his note therefor secured by a lien on the horse.

The evidence of the plaintiff tended to prove that the alleged sale to Alton J. Piper, was a sham sale, without consideration, for the purpose of removing plaintiff's lien; and that within two weeks of the alleged purchase by the defendant, the plaintiff demanded of him the amount due on his note given for the horse, and notified him not to pay the note to Piper. The defendant claimed title to the horse by virtue of his purchase thereof from Alton J. Piper.

(1) The defendant excepted to the charge of the court below, to the effect that if the alleged sale to Alton J. Piper was a sham sale, it was no defense to this suit, and the plaintiff was entitled to recover. Was this instruction correct? If it was a sham sale, a sham trade, in law it was no trade, no sale, and no title to the horse passed to Alton J. Piper, by virtue thereof. Under the license from the plaintiff to sell, he could only obtain title to the horse by an actual purchase. If he took him without such purchase, he held him subject to the lien of the plaintiff, and the defendant as his vendee, would hold subject to such lien. If Alton J. Piper induced the defendant to purchase the horse by making fraudulent representations in respect to his title thereto, the defendant has his remedy against him for such fraud, but such fraud does not affect the right of the plaintiff to the horse. The defendant standing upon and defending under the title of Alton J. Piper, the instruction to the jury on this subject was correct. *Thrall* v. *Lathrop*, 30 Vt. 307; *Church* v. *McLeod*, 58 Vt. 541.

(2) The court below instructed the jury, that the defendant, knowing the terms of the consent to the sale, could not defend in this action without showing that the

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pay for the horse, when sold by Burton D. Piper, was actually paid to the plaintiff,—that the burden was on him to show this. To this the defendant excepted.

In support of this ruling, the plaintiff relies on *White* v. *Langdon*, 30 Vt. 599. In that case, the license was "to trade off the horse, provided the pay or avails were paid to him, the plaintiff," and consequently only conferred authority to sell, but not to receive the pay for White. The pay was to come directly from the purchaser to him. In the case at bar, the authority to sell and receive the pay, is unlimited. This is the only fair, reasonable construction that can be given to the writing evidencing the license to sell. Burton D. Piper having unlimited authority to sell the horse and receive the pay therefor, the defendant was not bound to show that the pay for the horse was actually paid to the plaintiff, if there was in fact a *bona fide* sale of it to Alton J. Piper. Hence this instruction was erroneous.

The verdict being general, it does not appear whether the jury found for the plaintiff because the alleged sale to Alton J. Piper, was a sham sale, or because the defendant failed to show that the plaintiff received the pay for the horse. For aught that appears, the defendant may have been injured by this instruction, and consequently the judgment must be reversed. *Wilson* v. *Blake*, 53 Vt. 305.

Judgment reversed and cause remanded.

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LOUISE CLEMONS *vs.* EST. OF WARREN CLEMONS, apt.

May Term, 1897.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Judicial Disqualification—Acting as Counsel—Discretion—Attachment—Interest on Claims in Insolvency.

Under a statute which disqualifies for acting in a judicial capacity one who has acted as counsel in the same matter, a judge of the court of insolvency is not precluded from passing upon a claim consisting of a judgment of a common law court, by reason of the fact that he acted as counsel for the claimant in procuring that judgment.

Neither is he disqualified by reason of the fact that the judgment is partially secured by attachment, where it does not appear that he acted as counsel in respect to the attachment or passed upon its validity as judge.

No exception lies to the refusal to allow pleas to be filed out of time.

In appeals from the court of insolvency, the pleadings, trial and determination are the same, by statute, as in actions at law; hence the court properly treated the general issue as filed in the absence of any other plea.

Under the plea, *nul tiel record*, the judgment could not be impeached nor defended against except by contesting the existence of the record.

An attachment, as the debtor's property, of all the real estate in a given town, with the appurtenances thereof and the debtor's right in equity to redeem the same, is good to hold all the land in the town owned by the defendant, as appears of record.

The statute provides that upon claims in insolvency which are subject to the payment of interest, interest shall be computed to the date of filing the petition; but this is a rule of convenience intended to secure equality among creditors, and the judgment of the county court should not be reversed merely because it includes interest to a later date, for in the settlement of the estate equality may be preserved by computing interest on other claims to the same time.

APPEAL from the Court of Insolvency for the District of Manchester. Pleas to the jurisdiction and, the same being held insufficient on demurrer, *nul tiel record*. Trial by court at the December Term, 1896, Bennington County, *Thompson*, J., presiding. Judgment for the plaintiff. The defendant excepted.

Under the plea of *nul tiel record* the defendant offered

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evidence to impeach the judgment which constituted the plaintiff's claim, but the same was excluded and the defendant excepted.

Upon the facts found the court rendered judgment for the plaintiff to recover the amount of her judgment with interest to date and costs, and adjudged the same to be a preferred and secured claim by attachment, and ordered that the real estate attached be sold by the assignee, subject to all prior incumbrances and the debtor's homestead, and that the net proceeds, or so much thereof as might be necessary, should be applied to the payment of the debt and costs, and that the judgment and order should be certified to the court of insolvency.

W. B. Sheldon for the defendant.

Batchelder & Bates and *Barber & Darling* for the plaintiff.

ROWELL, J. The claim proved and allowed against the defendant, an insolvent estate, was a judgment of the supreme court, affirming a judgment of Bennington County Court. The oath of claim set out with great particularity the proceedings in the suit in which the judgment was obtained, but the defendant claimed, notwithstanding that, that upon entering the appeal in the county court, the plaintiff should file a statement of her claim, setting forth the same substantially as it would be necessary to set it forth in a declaration therein in an action at law, as provided by V. S. 2088. But the court held that the oath contained a sufficient statement of claim and that no other need be filed, to which no exception was taken. Thereupon the defendant obtained leave to plead, and pleaded to the jurisdiction the pendency of a suit in chancery involving the same matter. This plea was held bad on demurrer, whereupon the defendant again obtained leave to plead, and again pleaded to the jurisdiction, for that the judge of the court of insolvency who allowed said claim and granted the appeal had been retained by the plaintiff and had acted

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as counsel for her in obtaining the judgment of the county court that was thus affirmed; to which the plaintiff demurred. The oath of the claim set forth that the plaintiff had security by attachment of land, made more than four months before the filing of the petition in insolvency; but the record does not show nor the plea allege that the judge of the court of insolvency passed upon the validity of that attachment, nor that he was ever retained or acted as counsel in respect of the attachment. For aught that appears he may have been retained long after the suit was commenced and the attachment made. The statute prohibits a judge from acting in a judicial capacity in, or as a trier of, a cause or matter in which he has been retained or acted as an attorney or counsel. But this case does not come within the prohibition. The cause and matter that the judge tried were not the cause and matter in which he had been retained and acted as counsel, for that had been determined and ended by final judgment, and the allowance of that judgment was another and a different cause and matter. Therefore the plea is bad.

No exception lies to the refusal of the court to allow special pleas in bar to be filed out of time. That was matter of discretion, well exercised, in view of the fact that the defendant pleaded to the jurisdiction instead of to the merits, the declared purpose for which the leave was asked.

The court held that under the rule in such case made and provided, the general issue must be considered as already pleaded, and the case was tried thereon. This was correct, for by statute the pleadings, trial, and determination of the case, were to be as in an action at law, except that no execution could be awarded against the assignee for the debt found due to the plaintiff.

Under the plea, which was *nul tiel record*, the judgment could not be impeached for fraud nor otherwise defended against, except to contest the existence of the record as stated in the oath, which was held to be a sufficient declaration.

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The defendant questions the correctness of the adjudication that said attachment is valid against the assignee, for that the return on the copy of the attachment left in the town clerk's office is too general in description of the land to create a lien thereon. The return describes the property attached as the debtor's, as all the real estate in the town of Dorset, with the appurtenances thereof, and the debtor's right in equity to redeem the same. It was held the best part of a century ago that such an attachment is good to hold all the land in the town owned by the defendant in the action, as appears of record; and such has been the law ever since. *Young* v. *Judd*, Brayt. 151.

Interest was allowed on the judgment proved. It is conceded that the plaintiff is entitled to interest thereon to the time of payment to the extent of the realization from the attachment, but claimed that as to the unpaid balance of the debt, if any, interest must cease at the time of filing the petition. It is true the statute provides that upon debts subject to the payment of interest, interest shall be computed to the date of filing the petition. It is a matter of convenience that a time should be fixed for that purpose, and the time chosen is as convenient as any; but the statute does not mean that interest shall in no event be computed to a later date, for obviously it should be when, for instance, the assets are more than enough to pay the face of the debts as allowed. So, too, should it be when necessary to secure equality among creditors; and equality can be secured in this case by computing interest on all the other debts down to the time of the rendition of this judgment, which the court of insolvency can do on the matter being brought to its attention by the assignee. There was, therefore, no error in augmenting the judgment of the supreme court by adding accrued interest, although, perhaps, there might have been a judgment rendered as to the unpaid balance that would effectuate the same equality as the method suggested. Other methods might also be suggested.

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It is said that the court also increased the judgment of the supreme court by the amount of nine dollars costs, and objected that costs incurred after the filing of the petition cannot be proved. But the costs referred to, as we understand it, are the costs of this suit, to which the plaintiff is entitled by statute, § 2089,

Judgment affirmed and to be certified to the court of insolvency.

O. R. GARFIELD, admr., et al., *vs* RUTLAND INSURANCE CO. and trs.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Statute of Frauds—Offset in Trustee Process—Commissions.

A trustee cannot deduct amounts which he has paid or become chargeable for upon agreements not binding by reason of the statute of frauds.

The trustees, who were agents of the defendant, orally guaranteed to policy holders the payment of unearned premiums upon their policies in case of cancellation by the defendant, and received from the defendant a commission in view of such guaranties. *Held*, that the guaranties were unenforceable, as within the statute of frauds, and that the trustees were not entitled to deduct from funds of the defendant in their hands the amounts paid by them thereunder.

The agents were entitled to a percentage of "the premiums received." *Held*, that this meant the premiums as and when received and not the balance after deducting the unearned portion in case of cancellation.

TRUSTEE PROCESS. Heard upon the report of a commissioner at the September Term, 1896, Windham County, *Start*, J., presiding. The trustees were adjudged chargeable and excepted.

Clarke C. Fitts for the trustees.

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It was the custom for the trustees to pay the return premiums, and they should be allowed to deduct what they have thus paid. V. S. 1365; *Strong & Buck* v. *Mitchell*, 19 Vt. 644.

The trustees' undertaking was original and not within the statute of frauds. *Greene* v. *Burton*, 59 Vt. 423; *Farnham* v. *Chapman*, 61 Vt. 395.

The trustees, with the knowledge and for the benefit of the defendant, guaranteed by parol to refund the unearned premium to policy holders in case of cancellation. This at least placed them in the position of sureties for the defendant and they should be allowed to deduct whatever they have paid by reason of that relationship before disclosure. *Beach* v. *Boynton*, 26 Vt. 725; *Barney* v. *Grover*, 28 Vt. 391; *Rowell* v. *Felker*, 54 Vt. 526.

Waterman, Martin & Hitt for the plaintiffs.

The trustees were not authorized by the company to cancel their policies and pay back the unearned premiums. These payments were made by the trustees as guarantors by parol and the undertaking was unenforceable by reason of the statute of frauds. V. S. 1224; *Skinner* v. *Conant*, 2 Vt. 453; *Hazeltine* v. *Page*, 4 Vt. 49; *Strong* v. *Mitchell*, 19 Vt. 644; *Sinclair* v. *Richardson*, 12 Vt. 33; *Aldrich* v. *Jewell*, 12 Vt. 125; *Fullam* v. *Adams*, 37 Vt. 391.

The guaranty being a voluntary one creates no obligation upon the part of the defendant to reimburse the trustees.

MUNSON, J. The trustees were the agents of the defendant company, with power to receive proposals for insurance, to fix rates of premiums, to receive moneys, and to issue policies and consent to their transfer. The policy used by the company contained provisions for its cancellation, and for a return of the unearned portion of the premium. In the transaction of their business, the agents sometimes found it necessary to guarantee the solvency of the company and the repayment of premiums in the event

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of cancellation. In view of this situation, the company agreed to give the agents a commission of twenty per cent. in place of the fifteen per cent. before allowed. Subsequent to this, the trustees, in consideration that certain parties would take out policies in the defendant company, "guaranteed with each, by parol, the solvency of said company, and to refund to them the amount of unearned premiums" if the company should cancel their policies. The trustees seek to retain from the moneys in their hands the amount paid by them under these agreements. The plaintiff claims that these promises were collateral undertakings and not enforceable, and that the payments made upon them cannot be considered in determining the amount for which the trustees are chargeable.

It is held in this State that a trustee cannot be allowed amounts which he has paid out, or become chargeable for, on agreements not binding upon him because of the statute of frauds. *Hazeltine* v. *Page*, 4 Vt. 49; *Strong* v. *Mitchell*, 19 Vt. 644. So it becomes necessary to determine whether these promises were original or collateral undertakings. It has recently been said, upon a review of the cases involving this question, that both the English and American authorities are hopelessly in conflict, and that it can scarcely be said that any construction of the statutory provision on which the question arises is settled law. 95 Am. Dec. 251 note. This being the condition of the law, there is little inducement to depart from the decisions of our own State.

It is clear that there were two promises in this case, and that the second was not made original by an abandonment of the first. The liability of the company was contemplated by the arrangement, and its promise was tendered and taken with that of the agents. It is doubtless true that the main purpose of the agents was not to procure a benefit for the company, but to subserve a business interest of

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their own. In some jurisdictions this might be deemed sufficient to give the promise the character of an original undertaking. But we cannot give it that effect without ignoring the doctrine of *Fullam* v. *Adams*, 37 Vt. 391. It was held in that case that when the agreement is one which leaves the original obligation in force, it is to be regarded as collateral, unless the promissor receives something from the debtor to be applied upon the obligation, so that it becomes the duty of the promissor, as between him and the debtor, to make the payment. It is clear that as between the company and the trustees it remained primarily the duty of the company to refund the unearned premiums. There was nothing placed in the hands of the promissors as a provision for the payment. The extra commission was merely to compensate the agents for the risks of a guaranty, and did not put them under an obligation to make the payment in discharge of the company. So the trustees can retain nothing on account of payments made in fulfillment of these promises.

A question is raised as to what the trustees are entitled to retain on account of their services. They were to have twenty per cent. of the moneys received by them on account of premiums actually paid. We think this refers to the money received in regular course, and not to a balance determined by future cancellations. This view seems to be supported by the use of the same phrase in the cancellation clause of the policy, which refers to the contingency of cancellation, "the premium having been actually paid."

Judgment affirmed.

Taft, J., doubting.

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IN RE JAMES M. HAYNES'S EST., FIRST UNIVERSALIST PARISH OF ST. ALBANS, apt., MARY E. CHENNETTE, apee.

May Term, 1897.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Construction of Contract—Parol Evidence.

A legatee entitled to one-half of the residue of an estate made a contract disposing of "one-half of the balance and residue of said estate given and decreed to her," and it was held that these words meant one-half of her half.

Parol evidence was inadmissible to show that the parties actually intended otherwise.

APPEAL FROM PROBATE. Trial by court at the March Term, 1897, Franklin County, *Ross*, C. J., presiding. Decree of the probate court affirmed. The appellant excepted.

By the will, Mary S. King was to receive $2000, the Parish $10,000, Mary E. Chennette $2000, and other specific legacies, and the residue of the estate was to be divided equally between Mary E. Chennette and the Parish. The will was allowed in the probate court and an appeal taken by Mrs. King. While the appeal was pending in the county court a contract was signed by and between Mrs. King, Mary E. Chennette and the Parish by which it was agreed that the will should be allowed without contest and that the executor should pay to Mrs. King "one-half of the balance and residue of said estate given and bequeathed to the said Mary E. Chennette, to an amount not exceeding three thousand dollars;" and that the executor should pay Mrs. King from the share of the Parish enough to make up the sum of $3000, "if the said one-half residue and remainder of Mary E. Chennette's share is not equal to said three thousand dollars."

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Upon the strength of this agreement the probate court made its decree of distribution. The residue amounted to $5847.37, one-half of which, $2923.68, was by the will bequeathed to Mary E. Chennette and the other half to the Parish. The decree gave one-half of the last named sum, namely, $1461.84, to Mary E. Chennette, and the other half to Mrs. King and from the share of the Parish gave to Mrs. King $1538.16 to make the sum of $3000. The Parish appealed, and in the county court offered to show by parol evidence, covering the negotiations that preceded the contract, that the actual intention of the parties was that Mrs. King should receive the whole of Mary E. Chennette's half of the residue unless it exceeded $3000. The offer was excluded and the Parish excepted.

Farrington & Post for the appellant.

Wilson & Hall for the appellee.

MUNSON, J., The parol evidence offered by the appellant was properly excluded. The facts covered by the offer were not such as would aid the court in construing the language of the agreement. The payments provided for were based upon the residuum of the estate; and the question raised was whether the amount for which Mary E. Chennette became liable was one-half of the entire residue, or one-half of her share thereof. The only effect of the proposed evidence would have been to indicate which of the two constructions was in accordance with what the parties really intended. But the construction of the agreement was to be in accordance with the intention of the parties as therein expressed. The case afforded no ground for an inquiry as to their actual intention. *Re McKeough's Estate*, 69 Vt. 41.

This question of construction arises upon the stipulation of Mary E. Chennette for the payment to Mrs. King of "one-half of the balance and residue of said estate given and bequeathed to her the said Mary E. Chennette, to

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an amount not exceeding three thousand dollars." The appellant would give to the words "the balance and residue of said estate" their proper meaning, and would allow to the words "given and bequeathed to her the said Mary E. Chennette," no force inconsistent with that meaning. But we think the last expression is indicative of the manner in which the first is used, and that the clause as a whole means one-half of that portion of the residue given to Mary E. Chennette. It is true there is but one residuum; but when the residuum is given in shares to several persons, it is not meaningless to speak of the residuum given to each. This view is strengthened by the terms of the stipulation on the part of the Parish, which is for the payment of such sum as will make up the three thousand dollars "if the said one-half residue and remainder of Mary E. Chennette's share" is less than that sum. While neither stipulation is accurately expressed, we think the meaning of the agreement is sufficiently clear.

Judgment affirmed.

WILLIAM SEYMOUR *vs.* CENTRAL VERMONT R. R. CO.

January Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Railroad's Duty to One Permitted upon Its Track—Allegation Construed in Support of Declaration.

A railroad company is liable for an injury occasioned by the negligent management of its train to one who is walking upon its track in pursuance of a long continued custom, known and permitted by the company.

An allegation that the defendant managed its train with gross negligence in this, that a long rope was allowed to hang beside the train and

caught about the plaintiff's arm and dragged him along the ground, is capable of the construction that the defendant knowingly allowed the rope to so hang, and should be so construed in support of the declaration.

CASE for negligence. Heard on general demurrer to the declaration at the September Term, 1896, Chittenden County, *Tyler*, J., presiding. *Pro forma* judgment sustaining the demurrer and adjudging the declaration insufficient. The plaintiff excepted.

The declaration alleged that the plaintiff when he received the injury was walking on a portion of the railroad which had been for many years in constant use by the public as a passage way with the knowledge and implied consent of the defendant.

C. W. Witters for the defendant.

The defendant owed the plaintiff no duty in regard to the management of its train, for the plaintiff was a trespasser. *Pierce* v. *Whitcomb*, 48 Vt. 127; *Fay* v. *Kent*, 55 Vt. 557; *Kennedy* v. *Morgan*, 57 Vt. 46; *Gaynor* v. *Old Colony, etc., R. R. Co.*, 100 Mass. 208.

H. F. Wolcott for the plaintiff.

TAFT, J. We notice the questions raised by the brief of the defendant's counsel and none other.

The defendant assigns seven reasons why the declaration is insufficient to establish a cause of action. The first six raise substantially the same question and are all based upon the claim that the plaintiff was in fact a trespasser upon the road-bed and therefore the defendant was under no duty in respect to him.

The plaintiff may establish his right of action by showing that his injury arose from the neglect of the defendant, if he was in the exercise of ordinary care at the time of the casualty, notwithstanding he was upon that part of the road-bed which was not a public crossing, and although he was not there by the invitation of the defendant, nor by any inducements held out by the defendant to him, and was

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there without any purpose of transacting business with the defendant. It is not necessary that he should allege that he was using the road by any agreement with the defendant. A legal duty or obligation from the defendant to the plaintiff might arise notwithstanding the existence or the absence of any of the facts above stated; it is unnecessary for the plaintiff to allege that the defendant was wilfully or recklessly negligent. In respect to negligence it would depend upon whether the defendant was in the exercise of ordinary care. The allegation in the declaration is that the plaintiff was upon the track with the implied consent of the defendant, in pursuance of a long continued custom which was known to the defendant, and permitted by it without objection. Under these circumstances the defendant cannot excuse itself, from any negligence of which its servants were guilty at the time the accident occurred, by showing the existence or non-existence of any of the facts stated.

The seventh point under the demurrer is that the action cannot be sustained because it is not alleged that the defendant knew, or by the exercise of due care, might have known that the rope was in the position claimed. The allegation in that respect is "That the defendant by its servants managed the train with gross negligence in this, that a long rope was allowed to hang beside the train, etc., far outside,—and beyond the side, of the cars and that the rope caught about the plaintiff's arm and hand, etc., and so dragged him along the ground," etc. This allegation is capable of the construction that the defendant knowingly allowed the rope to hang, drag, etc. While, in case of doubt, if the pleadings are ambiguous, or when two different meanings present themselves, that construction must be adopted which is most unfavorable to the pleader, still if the expression is capable of two meanings that shall be taken which will support the declaration and not the other which will defeat it. The allegation in the declaration can fairly bear a construction that the defendant

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knowingly allowed the rope to drag, hang, etc.; the declaration is not subject to the criticism made in that respect.

The pro forma judgment is reversed, the demurrer overruled, declaration adjudged sufficient, and cause remanded for further proceedings.

Start, J., dissents.

THOMAS MACK *vs.* P. A. CAMPEAU, et al.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Allegations Construed—Contract to Shield from Criminal Prosecution.

The parties to a contract made for the purpose of saving one of them from a criminal prosecution cannot be heard to deny the fact of guilt, but must be treated as they have treated themselves.

The allegations of the bill are construed to mean that as the consideration of the contract sought to be enforced, the orator undertook to shield the defendant from prosecution for a crime of which the defendant was guilty; consequently the aid of the court is refused.

BILL IN CHANCERY. Heard upon demurrer incorporated in the answer, at the December Term, 1896, Addison County, 1896. *Tyler*, Chancellor, sustained the demurrer, and dismissed the bill with costs to the defendants. The orator appealed.

The bill alleged that the orator had been for a long time in the business of buying and selling coal in the city of Vergennes, making therein a reasonable profit; that the defendant, Campeau, was the pastor of the Roman Catholic church in the same city and engaged in the coal business which he conducted at such prices that the orator could not compete with him; that Campeau had been accused by one

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Egan of criminal intimacy with Egan's wife and alienating her affections; and that Egan was threatening legal proceedings against him, to recover damages, and to subject him to criminal prosecution; that Campeau, realizing his liability to such proceedings, and desiring to avoid the expense and damage of the same, and to save the exposure, punishment and scandal that would be incident thereto, besought the orator's services in that behalf, and in consideration that the orator would intercede and use his influence with the said Egan to dissuade him from instituting legal proceedings against Campeau upon said criminal relations,—and in further consideration that the orator would purchase Campeau's entire stock of coal,—he, Campeau, promised the orator that he would not thereafter engage in the coal business in Vergennes in competition with the orator; that the orator had performed upon his part but that Campeau was still competing with him in the coal business; and prayed for an injunction.

The defendant, Campeau, answered denying the principal allegations and insisting that the contract set forth in the bill was illegal and void as against public policy asking to have the same benefit thereof as if he had demurred to the bill for that cause.

F. W. McGettrick and *F. L. Fish* for the orator.

To avoid a contract on the ground that the consideration was an agreement to compromise a crime, it must appear that a crime had been committed. *Swope* v. *Jeff. Fire Insurance Co.*, 93 Pa. 251; *Malh* v. *Willett*, 57 Iowa 705; *Breathwit* v. *Rogers*, 32 Ark. 758. No such fact appears from this record.

Roberts & Roberts for the defendants.

Ross, C. J. (1) The orator contends that the demurrer should have been overruled because the bill does not in terms allege that the defendant, Campeau, had been guilty of criminal intimacy with the wife of Egan, and for that

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reason, no crime is shown by the bill to have existed which could have been the subject of the negotiations between the orator and Campeau. The bill alleges that Egan had accused Campeau with having been criminally intimate with Egan's wife; and that he had alienated her affections; that "Egan was threatening legal proceedings" against him "to recover damages," and "to subject" him "to criminal prosecution;" "that Campeau realizing his liability to such proceedings and desiring to avoid the damage and expense of the same, and to save the exposure, *punishment* and scandal that would be incident thereto, besought the orator for his services in that behalf." The bill further alleges that the orator entered upon the employment and did "intercede with, influence, persuade and induce Egan to forego and refrain from *prosecuting* or instituting legal proceedings against Campeau," on account of the alleged criminal relations.

Under the decisions of this State these allegations are a sufficient setting forth that Campeau had been guilty of the alleged criminal intimacy. By his employment of the orator to dissuade Egan from prosecuting or instituting legal proceedings against him on account of his alleged criminal relations with Egan's wife, he admitted that he was guilty of the crime charged. *Dixon* v. *Olmstead*, 9. Vt. 310; *Bowen* v. *Buck*, 28 Vt. 308. *Dixon* v. *Olmstead* is trover to recover for the conversion of a horse. To sustain the action these facts in substance were shown. The defendant residing in New Hampshire sent his agent into this State, who, after procuring a warrant for the plaintiff's arrest and surrender to the authorities of New Hampshire to be tried on an alleged charge of forgery committed in that State, induced the plaintiff, who denied the charge and declared himself innocent of it, to settle by giving the defendant the horse, among other things. No other evidence that a forgery had been committed by the plaintiff in New Hampshire was given. The defendant contended that the

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alleged crime must be established, and that the horse had been given in settlement of the crime, to entitle the plaintiff to recover. But the court said: "For the purposes of this trial, it must be considered first, that the plaintiff was guilty of the offense. For if when he was threatened only with *legal* process and the *ordinary* proceedings in such cases he saw fit to come forward and compromise the matter, it is not in *his* mouth to deny *his guilt*." *Bowen* v. *Buck*, follows the doctrine announced in *Dixon* v. *Olmstead*, and holds that the parties to such transactions are to be held and treated as they treat themselves; that if they enter upon negotiations and settlements in which they treat themselves as guilty of the alleged crime they will be so treated when those negotiations and settlements are brought under legal investigation. Hence the bill alleges sufficient facts to have the court treat the transactions between the orator and Campeau as they treated them, as of and concerning criminal relations existing between Campeau and the wife of Egan.

(2) The orator also contends that if Campeau had been guilty of having criminal relations with Egan's wife, Egan would have a valid claim against him growing out of those relations, and that Campeau could lawfully employ the orator to settle or adjust the claim of Egan growing out of the same. The contention is sustainable, if the allegations of the bill do not fairly include in the orator's employment the prevention of a criminal prosecution to be set on foot by Egan To support his contention the orator relies upon this allegation, "and in consideration that the orator should intercede and use his influence with Egan, to dissuade him from *instituting legal proceedings* against Campeau, based upon the afore-mentioned criminal relations," etc. He contends that the only legal proceedings Egan could institute against Campeau growing out of such relations were those to recover private damages. This construction possibly might be given to this allegation if it stood alone.

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Yet it must be remembered that Egan might by complaint to the proper officer, be instrumental in commencing a criminal prosecution against Campeau. It was his duty as a citizen to make such complaint, if he had knowledge of the commission of the crime. But when this allegation is read in connection with that which immediately precedes, that Egan had threatened to subject Campeau to criminal prosecution, that Campeau desiring to save the exposure, *punishment*, and scandal that would be incident thereto, sought the orator's services *in that behalf*; and in connection with what follows, that the orator did induce Egan to refrain from *prosecuting* and instituting legal proceedings, it fairly imports that the orator was employed not only to prevent Egan from instituting a civil suit, but also to prevent him from causing to be commenced a criminal prosecution. The meaning of words and phrases in pleadings, very frequently depends upon the context. *Royce* v. *Maloney*, 58 Vt. 445. The language relied upon by the orator, "instituting legal proceedings," when read in connection with the context, fairly imports criminal, as well as civil proceedings. It is not contended that if part of the consideration for the agreement, which the orator asks to have enforced, was the suppression of criminal prosecution, equity will aid the orator in enforcing it.

The decree of the court of chancery, sustaining the demurrer and adjudging the bill insufficient, is affirmed and cause remanded.

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BURDITT BROS. *vs.* L. C. HOWE.

May Term, 1897.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Parol Evidence—Sight Draft with Bill of Lading—When Title Will Pass.

When goods are sold and shipped on terms of payment, "by sight draft with bill of lading attached," the title to the goods does not pass until the draft is paid.

It being evident that a part of the contract rested in parol, such evidence was properly received, although the order and acceptance were in writing.

TROVER for forty barrels of flour. Plea, the general issue. Heard on the report of a referee and the defendant's exceptions thereto at the March Term, 1897, Rutland County, *Tyler*, J., presiding. *Pro forma* judgment sustaining the exceptions and that the defendant recover his costs. The plaintiff excepted.

The following is a summary of the report. The plaintiffs are dealers in flour at Rutland. The defendant is a sheriff and as such took the flour in controversy from a railroad car at Ludlow, October 28, 1893, upon writs of attachment against the firm of Hubbard & Moore, in which George M. Moore was a partner. Early in October, 1893, said Moore had a talk with F. L. Bigelow, a salesman for the plaintiffs, about buying of them fifty barrels of flour. Bigelow gave Moore the price and informed him that he could not have credit but that payment must be made by sight draft and it was agreed that if Moore should send an order there should be a sight draft with bill of lading attached. October 21st, Moore sent Bigelow a postal card as follows: "Have placed 50 bbls. E. Lt. at price mentioned, f. o. b. Ludlow. St. draft. Ans." On the same day Bigelow replied by letter saying that he would send the

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fifty barrels at the price named and make sight draft through the Ludlow Bank at the time of shipment. The plaintiffs had sold thirty barrels of flour to Spaulding & Son of Ludlow and on October 24th shipped those thirty barrels and the fifty barrels ordered by Moore in the same car, marking each portion with the purchaser's name upon every barrel, and on the same day sent through the bank for collection a sight draft on Moore for the price of the fifty barrels with bill of lading attached. The car arrived at Ludlow, October 26th, and Moore being notified of its arrival by Spaulding & Son drew away ten barrels on October 27th, and on October 28th was about to draw away the other forty barrels when the attachment was made. Spaulding & Son had no authority to deliver the flour to Moore.

The defendant objected and excepted to the admission of parol evidence concerning the contract on the ground that the terms were completely shown by the correspondence between Moore and Bigelow.

G. E. Lawrence for the plaintiff.

W. W. Stickney and *J. G. Sargent* for the defendant.

TAFT, J. It is argued by defendant's counsel that the parol testimony covered by the exceptions to the report was not admissible for that "the correspondence of Bigelow (the plaintiff's agent) and Moore constitute a complete contract in writing."

It is evident that a part of the contract rested in parol, viz: that a bill of lading was to accompany the draft and that the title to the flour was not to pass until the draft was paid. This made the parol testimony admissible and the exceptions to the report are overruled. *Winn* v. *Chamberlin*, 32 Vt. 320; *Reynolds* v. *Hassam*, 56 Vt. 449. That the title would not pass, was the legal effect of the draft and bill of lading. *Tilden* v. *Minor*, 45 Vt. 196. The

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The pro forma judgment reversed, the defendant's exceptions to the report overruled, and judgment rendered for the plaintiffs.

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Complaints of present suffering admissible though not made to physician or nurse. *Brown* v. *Mount Holly*, 364.

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Both parties having excepted, the plaintiff obtaining a reversal upon one point, is entitled to costs. *Darling* v. *Clement*, 292.

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Abolished district may pay outlawed debt. *Hartford* v. *School District*, 147.
School district may not divide public money among taxpayers. *Town of Barre* v. *School District*, 374.

SEAL.

See BOND.

SECRET TRUST.

See SALE.

SET-LINE.

See DEFINITIONS.

SLANDER.

Plea insufficient, that defendant believed words true, where he must have known whether true. *Smith* v *Johnson*, 231.
Where prefatory averment necessary. *Darling* v. *Clement*, 292.
When meaning may be ascribed by innuendo. *Ibid.*

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Words to be taken in natural meaning. *Ibid.*

Stealing wood from land, held to mean larceny, not trespass. *Ibid.*

If natural tendency of words is to injure in occupation, special damage need not be alleged. *Ibid.*

Words charging an instructor of youth with habitual intemperance have such tendency. *Ibid.*

So words charging him with permitting his pupils to steal. *Ibid.*

But otherwise of words imputing poor financial credit to such an one. *Ibid.*

To charge buyer and seller of live stock with insolvency is actionable *per se*. *Ibid.*

A count held bad for duplicity. *Ibid.*

STATUTES AND CONSTITUTIONAL PROVISIONS NOTICED OR CONSTRUED.

Acts of 1896, No. 38. *Gregg & Co.* v. *Beane*, 22.

R. L. 1444 (V. S. 1686), R. L. 1445 (V. S. 1687), R. L. 3132 (V. S. 3513). *Barre* v. *Jerry*, 63.

Acts of 1892, No. 17. *Sprague* v. *Fletcher*, 69; *Hughes* v. *Kelley*, 443.

U. S. Constitution, Art. 4, § 2. *Sprague* v. *Fletcher*, 69.

V. S. 711, 720. *Sprague* v. *Fletcher*, 69.

V. S. 1471. *Campbell* v. *Camp*, 97.

V. S. 5128, 5130. *State* v. *McMillan*, 105.

V. S. 1437, 2595. *In re Welch's Will*, 127.

Vermont Constitution, Art. 12. *In re Welch's Will*, 127.

Acts of 1892, No. 20. *Hartford* v. *School District*, 147.

V. S. 1307, 1365. *Husted* v. *Stone and Dean*, 149.

V. S. 915. *West Derby* v. *Cemetery Association*, 166.

V. S. 2290. *Reed* v. *Starkey*, 200.

V. S. 2201. *In re Kelso's Est.*, 272.

V. S. 1640. *Sowles* v. *Bailey*, 277.

V. S. 5417, form 55. *In re Thayer*, 314.

Acts of 1894, No. 165, § 73. *Town of Barre* v. *School District*, 374.

V. S. 2140. *Town of Pawlet* v. *Kelley*, 398.

V. S. 4592. *State* v. *Stevens*, 411.

V. S. 2156. *In re Brainard*, 459.

V. S. 1232. *Shattuck* v. *Wrought Iron Range Co.*, 468.

V. S. 2166. *Whitcomb* v. *Robbins*, 477.

V. S. 1151. *Dibble & Canedy* v. *Deerfield River Co.*, 482.

R. L. 1810, 1870, 2273. *Court of Insolvency* v. *Meldon*, 510.

Acts of 1884, No. 125. *Court of Insolvency* v. *Meldon*, 510.

V. S. 2143. *Sowles* v. *Bailey*, 515.

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Trustee cannot deduct what he has paid under contract void by reason of statute of frauds. *Garfield* v. *Insurance Co.*, 549.
Certain guaranties by insurance agents of return of unearned premiums held unenforceable. *Ibid.*

STATUTE OF LIMITATIONS.

Burden on one setting up, to show he had known attachable property. *Burnham* v. *Courser*, 183.
Runs on demand which party might have enforced by application but failed to do so. *Brown's Exr.* v. *Hitchcock*, 197.
Orator in bill to redeem cannot say mortgage debt outlawed. *Oakman* v. *Walker*, 344.

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Of notes on condition, condition enforced. *White's Est.* v. *White's Est.*, 360.
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Bank stock owner's right is invaded by sale of same for illegal taxes, though he bid it in and no transfer is made on books of bank. *Sprague* v. *Fletcher*, 69.
Acts of 1892, No. 17, violates U. S. Constitution by discriminating against non-residents. *Ibid.*
Duty of taxpayer claiming deductions as to making inventory. *Ibid.*
Another list held void under same rule. *Hughes* v. *Kelley*, 443.
To be entitled to benefit of rule in *Sprague* v. *Fletcher*, one must have answered interrogatories. *Ibid.*
Tax bill held good though taxes blended, sufficient data appearing. *Ibid.*
Collector may sell *en masse*. *Ibid.*
Misapplication of proceeds does not make collector trespasser. *Ibid.*

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